Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the Petitioners

EVELLE J. YOUNGER
Attorney General of the State of California

R. H. CONNETT
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

RICHARD C. JACOBS
Deputy Attorney General

Attorneys for the Petitioners
6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Federal Laws Involved	2
Statement of the Case	2
Summary of Argument	12
Argument	16
I. Section 8 of the Reclamation Act of 1902, Viewed in Light of Its Language, Legislative History, Surrounding Historical Circumstances and Administrative Interpretation and Practice, Provides for State Control of Appropriation and Distribution of Water Under the Act	17
II. The Bureau of Reclamation Lacks a Reserved Water Right With Respect to the New Melones Project, and Hence Must Comply With California's Appropriation Laws	40
III. This Court Has Held That Section 8 Requires the Bureau of Reclamation to Comply With State Appropriation Laws to the Extent Not Inconsistent With Specific, Fundamental Policies Established by Congress, Which Indicates That Section 8 Should Be Read As Not Authorizing the States to Impose Conditions That Are Inconsistent With the Congressionally-Authorized Purposes of Federal Reclamation Projects	48

Page

IV. The Conditions Imposed by California Are Not Inconsistent With the Purposes of the New Melones Project 65

V. Assuming Arguendo That Section 8 Does Not Require the Bureau to Fully Comply With the States' Appropriation Laws, the Bureau Should Be Required to Fully Comply With These Laws When It Elects to Acquire Its Water Rights Under State Law 68

VI. Assuming Arguendo That Section 8 Does Not Require the Bureau to Fully Comply With the States' Appropriation Laws, the Bureau Must Fully Comply With These Laws When It Elects to Obtain an Assignment of State-Held Water Rights 70

Conclusion 73

Appendix 1a

TABLE OF AUTHORITIES

CASES Pages

Alabama Public Service Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951) 67
Arizona v. California, 373 U.S. 546 (1963) 41, 42, 44, 53

Bank of America v. State Water Resources Control Bd., 42 Cal.App.3d 198 (1974) 4
Bates v. State Bar, ... U.S. ....., 45 U.S.L.W. 4895 (1977) 74

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 31, 32, 33, 46
Caminetti v. United States, 242 U.S. 470 (1917) 56
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 74
Cappaert v. United States, 426 U.S. 128 (1976) 41, 42, 71
Chow v. City of Santa Barbara, 217 Cal. 673 (1933) 62
City of Fresno v. California, 372 U.S. 627 (1963) ....Passim
Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966) 67

DeCoteau v. District Court, 420 U.S. 425 (1975) 31

EDF v. Armstrong, 487 F.2d 814 (9th Cir. 1973), cert. denied 416 U.S. 974 (1974) 10
Environmental Protection Agency v. California, 426 U.S. 200 (1976) .....Passim
Enzor v. United States, 262 F.2d 172 (5th Cir. 1958) 51

French v. Rishell, 40 Cal.2d 477 (1953) 66

Hancock v. Train, 426 U.S. 167 (1976) .....Passim
Hornsby v. Dobard, 291 F.2d 483 (5th Cir. 1961) 69

Ickes v. Fox, 300 U.S. 82 (1937) 33, 42
Irwin v. Phillips, 5 Cal. 140 (1885) 32

Pages

Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958) ..... Passim

Jennison v. Kirk, 98 U.S. 453 (1878) 32
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 58

Kansas v. Colorado, 206 U.S. 46 (1907) 41, 42

Mattz v. Arnett, 412 U.S. 481 (1973) 56
Morrison-Knudsen Co. v. O'Leary, 288 F.2d 542 (9th Cir.) 67

National League of Cities v. Usery, 426 U.S. 833 (1976) 70, 73
Nebraska v. Wyoming, 295 U.S. 40 (1935) ..... Passim
Nebraska v. Wyoming, 325 U.S. 589 (1945) ..... Passim

Paramount Transport Systems v. Chauffeurs Local 150, 436 F.2d 1064 (9th Cir. 1971) 67
Perkins v. Matthews, 400 U.S. 379 (1970) 36
Preiser v. Rodriguez, 411 U.S. 475 (1973) 51

Railway Comm'n v. Rowan and Nichols Oil Co., 311 U.S. 570 (1941) 67
Rodrigue v. Aetna Casualty Co., 395 U.S. 352 (1959) 74
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 56

Safir v. Gibson, 432 F.2d 137 (2d Cir. 1970) 66

Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90 (1955) 66
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 74
Train v. Colorado Pub.Int.Res. Group, 426 U.S. 1 (1976) 56

Pages

Udall v. Tallman, 380 U.S. 1 (1964) 56
United States v. District Court, 401 U.S. 419 (1971) 41, 42, 69
United States v. Fallbrook Pub.Util.Dist., 165 F.Supp. 806 (S.D. Cal. 1958) 66
United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) 69
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 3, 31, 36, 42
United States v. Orr Water Ditch Co., et al., Equity No. A-3 (D.Nev. 1944) 44
United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899) 41
United States v. Utah Const. & Mining Co., 384 U.S. 394 (1966) 66

Zemel v. Rusk, 381 U.S. 1 (1965) 36

CONGRESSIONAL STATUTES

Statutes at Large

Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t 53

Desert Land Act of 1877, 19 Stat. 377 32

Flood Control Act of 1944, 58 Stat. 887 ..... 3, 35
Flood Control Act of 1962, 76 Stat. 1180 ..... 3, 18, 66

Homestead Act of 1862, 12 Stat. 392 32

Mining Act of 1866, 14 Stat. 251 32
Mining Act of 1870, 16 Stat. 217 32

Pages

Reclamation Act of 1902, 32 Stat. 388, as amended 43 U.S.C. §§ 371 *et seq.* ..... Passim

Section 8, Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 ..... Passim
Reclamation Project Act of 1939, as amended, 70 Stat. 484 (1956), 43 U.S.C. § 485h-4 35
Rivers and Harbors Act of 1935, 49 Stat. 1028 3
Rivers and Harbors Act of 1937, 50 Stat. 844 3

United States Code

28 U.S.C. § 1254(1) 1
43 U.S.C. § 391 3
43 U.S.C. § 666 ..... 35, 69

TREATIES

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848) 32

U.S. CONSTITUTION

U.S. Const., Art. I, § 8 41
U.S. Const., Art. IV, § 3 41

CALIFORNIA CONSTITUTION AND CODES

Cal. Const., Art. X, § 2 4
Cal. Water Code §§ 1201, 1225, 1240, 1250-1358, 1375-1415 4
Cal. Water Code §§ 1450, 1455 5
Cal. Water Code §§ 1202 33
Cal. Water Code §§ 1340-1360 ..... 65, 66
23 Cal. Admin. Code § 733(j) 67

Pages

CONGRESSIONAL MATERIALS

Congressional Record

35 Cong. Rec. 5676, 57th Cong., 1st Sess. (1902) 26
35 Cong. Rec. 6672, 57th Cong., 1st Sess. (1902) 26
35 Cong. Rec. 6673, 57th Cong., 1st Sess. (1902) 20, 26
35 Cong. Rec. 6676, 57th Cong., 1st Sess. (1902) 20, 25
35 Cong. Rec. 6679, 57th Cong., 1st Sess. (1902) 19
35 Cong. Rec. 6682, 57th Cong., 1st Sess. (1902) 20
35 Cong. Rec. 6702-6707, 57th Cong., 1st Sess. (1902) 20
35 Cong. Rec. 6706, 57th Cong., 1st Sess. (1902) 20
35 Cong. Rec. 6731-6732, 57th Cong., 1st Sess. (1902) 20
35 Cong. Rec. 6734, 57th Cong., 1st Sess. (1902) 20, 21
35 Cong. Rec. 6737, 57th Cong., 1st Sess. (1902) 20
35 Cong. Rec. 6740, 57th Cong., 1st Sess. (1902) 20, 21
35 Cong. Rec. 6743, 57th Cong., 1st Sess. (1902) 26
35 Cong. Rec. 6748, 57th Cong., 1st Sess. (1902) 26
35 Cong. Rec. 6752, 57th Cong., 1st Sess. (1902) 26
35 Cong. Rec. 6775, 57th Cong., 1st Sess. (1902) 20, 23
95 Cong. Rec. A 961, 81st Cong., 2d Sess. (1948) 38

Congressional Reports

H.R. Doc. No. 44, 58th Cong., 2d Sess. (1904) 37
H.R. Doc. No. 28, 58th Cong., 2d Sess. (1905) 38
H.R. Doc. No. 416, 84th Cong., 2d Sess. (1956) 38
H.R. Rep. No. 1468, 57th Cong., 1st Sess. (1902) 19, 20, 34
S. Rep. No. 254, 57th Cong., 1st Sess. (1902) 23
S. Rep. No. 755, 82d Cong., 1st Sess. (1951) 35
S. Rep. No. 94-717, 94th Cong., 2d Sess. (1976) 55
S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977) 55

Congressional Bills

H.R. 6790, 52d Cong., 1st Sess. (1892) 20
H.R. 13846, 56th Cong., 2d Sess. (1901) 20

Pages

Congressional Hearings

"Federal-State Water Rights," Hearings on S. 1375 Before Subcommittee on Irrigation & Reclamation, Sen. Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. (1964) 36, 38

ADMINISTRATIVE

Decision 1422, State Water Resources Control Board ..... Passim

U.S. Dept. of Interior, "Proceedings of Second Conference of Engineers of the Reclamation Service" (1905) 33, 37

U.S. Dept. of Interior, "Third Annual Report of the Reclamation Service," 1903-04 (2d ed.) (1905) 34

U.S. Dept. of Interior, "Reclamation Instructions," §§ 116.3.1, 231.5.1 39

MISCELLANEOUS

Hutchins, "California Law of Water Rights" (1956 ed.) 33

Hutchins, "Water Rights Laws in the Nineteen Western States" (1971) 33

Meyers, "The Colorado River," 19 Stan.L.Rev. 1 (1966) 53

Sax, "Problems of Federalism in Reclamation Law," 37 Univ. of Colorado L.Rev. 49 (1964) 53, 59

Trelease, "Arizona v. California: Allocation of Water Resources to People, States and Nation," 1963 Sup. Ct. Review 158 53

Trelease, "Reclamation Water Rights," 32 Rocky Mtn. L.Rev. 464 (1960) 36, 59, 63

2 Weil, "Water Rights in the Western States" (3d ed. 1911) 33

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

OPINION BELOW

The decision of the U. S. Court of Appeals is reported at 558 F. 2d 1347. App. I, 28-41. The decision of the district court is reported at 403 F. Supp. 874. App. I, 42-96.

JURISDICTION

The final decision of the U. S. Court of Appeals was rendered on August 12, 1977. The petition for writ of certiorari was filed on August 19, 1977, and granted on December 2, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does section 8 of the Reclamation Act of 1902 require the Bureau of Reclamation, in acquiring its rights to unappropriated water under the act, to acquire its rights under the states' appropriation laws? Or, instead, does the Bureau acquire a federal reserved water right independently of state law, under the "implied reservation" doctrine?

2. If section 8 requires the Bureau of Reclamation to acquire its water rights under the states' appropriation laws, is the Bureau exempt from such laws to the extent that such laws provide for conditions to protect the "beneficial use" of water, in instances where such conditions are not inconsistent with specific federal reclamation laws or with the purposes of the federal reclamation project?

3. If section 8 does not require the Bureau of Reclamation to acquire its rights under the states' appropriation laws, must the Bureau nonetheless comply with conditions resulting from such laws when it elects to acquire, independently of section 8, (1) its own water rights under the states' appropriation laws, or (2) an assignment of water rights acquired by a state agency under the states' appropriation laws?

FEDERAL LAWS INVOLVED

This case involves an interpretation of section 8 of the Reclamation Act of 1902, 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970).

STATEMENT OF THE CASE

The primary question raised in this case is whether section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390 (1902), 43 U.S.C. §§ 372, 383 (1970), which requires the U.S. Bureau of Reclamation to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water,[1] requires the Bureau to comply with the states' appropriation laws in acquiring and using unappropriated water for federal reclamation projects. Since water from such projects is ultimately distributed to non-federal users, such as agricultural, municipal and industrial users, the question is whether Congress has authorized the states to exercise their traditional control over water that is used by their own citizens, and that affects the economic growth and development of the states.

1. The full text of § 8 appears at page 18, *infra*.

1. The New Melones Project.

The Reclamation Act of 1902, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* (1970), establishes a program for federal construction and operation of reclamation projects in 17 western states.[2] The projects divert and store waters that are ultimately distributed to agricultural, municipal and industrial interests. Under the act, Congress has authorized many reclamation projects, the largest of which is a vast array of dams, reservoirs and waterways in California collectively known as the Central Valley Project ("CVP"). See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 727-735 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-284 (1958). The CVP was originally authorized by the Rivers and Harbors Act of 1935, 49 Stat. 1028, and the Rivers and Harbors Act of 1937, 50 Stat. 844, 850. The CVP is operated by the Bureau of Reclamation ("Bureau"). The waters of the CVP arise and flow solely in California.

As water needs and uses have expanded in California, Congress has authorized additional units of the CVP. One such unit is the New Melones Project, authorized by the Flood Control Act of 1944, 58 Stat. 887, and the Flood Control Act of 1962, 76 Stat. 1180, 1191. The purposes of the

2. The 17 states are, in addition to California, Arizona, Colorado, Idaho, Kansas, Montana, Nevada, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming. 32 Stat. 388 (1902), as amended 43 U.S.C. § 391 (1970). All these states have filed an *amicus* brief in support of California's position.

project are flood control, irrigation, municipal use, industrial use, power, recreation, water quality control and protection of fish and wildlife. *Ibid.* The main feature of the project, when completed, will be a dam on California's Stanislaus River, with the capacity to impound 2.4 million acre-feet of water. R. 830. The lands acquired for the project were acquired by purchase and condemnation, not by withdrawal of lands from the public domain. Df. Ex. 3(a), 3(b), 3(c), 3(d) (App. II, 43, 52, 60, 64). The waters destined for the project arise and flow solely in California.

2. California's Appropriative Procedure.

Under California law, any person who appropriates unappropriated water in California must apply for, and receive, a permit from the State Water Resources Control Board ("State Board"). Cal. Wat. Code §§ 1201, 1225, 1250-1258, 1375-1415. The State Board issues the permit if it (1) determines that unappropriated water is available, (2) determines that the proposed use is "reasonable" and "beneficial," and (3) imposes such conditions in the permit as are necessary to insure the "reasonable" and "beneficial" use of water. Cal. Const., Art. X, § 2; Cal. Wat. Code §§ 1201, 1240, 1375; *Bank of America v. State Water Resources Control Bd.*, 42 Cal.App. 3d 198 (1974). California's permit procedure is similar to that of most other western states whose waters are utilized under the Reclamation Act of 1902. See note 25, *infra*.

The Bureau has consistently complied with California's appropriation procedures in acquiring its rights to unappropriated water for the CVP; in fact, it has never acquired its rights to unappropriated water except pursuant to such procedures. *United States v. Gerlach Live Stock Co., supra* at 740 n. 14; Df. Ex. 1, pp. 1-2 (App. II, 1-2); I CVP

Documents 717-720;[3] II CVP Documents 543-552. Its compliance with these procedures has taken two forms. First, it has applied directly to the State Board for its own permits. *Ibid.* Second, it has applied to the State Board for the assignment of permit applications previously filed by a State agency, the State Department of Finance. *Ibid.* The latter agency filed its applications beginning in 1927, so that the State—in anticipation of then-planned State-construction of the CVP—could obtain a prior right to the use of water, as against appropriators who filed later applications; the Bureau has sought the assignment of these applications so that it could obtain the benefits of these prior rights. I CVP Documents 717-718.[4] In effect, the Bureau has applied directly for its own rights, and for the assignment of State-held water rights.

3. Decision 1422.

The Bureau followed these two procedures in acquiring its rights to unappropriated water for the New Melones Project. It applied in 1960 for its own permits. Df. Ex. 3(c), 3(d) (App. II, 59, 63). It also applied in 1967 for the assignment of permit applications, filed in 1952 by the State Department of Finance, which the latter agency had agreed to assign to the Bureau subject to the State Board's approval.

---

3. "CVP Documents" is a reference to "Central Valley Project Documents," a document published by the House of Representatives in two parts. Part I, entitled "Authorizing Documents," is published as House Document No. 416, 84th Cong., 2d Sess. (1956). Part II, entitled "Operating Documents," is published as House Document No. 246, 85th Cong., 1st Sess. (1957).

4. Under California law, an appropriator acquires a priority to the use of water based on the date that he submits his application for an appropriative permit to the State Board, a priority which continues after the application is approved by the State Board. Cal. Wat. Code §§ 1450, 1455.

Df. Ex. 3(a), 3(b), 4 (App. II, 41, 51, 69). All its applications were submitted after, rather than before, the project was authorized by Congress in 1944.

After lengthy hearings, the State Board issued Decision 1422 in 1973, resulting in the issuance of conditional permits to the Bureau. Df. Ex. 2 (App. II, 6-40). In the decision, the State Board found that unappropriated water is available for the New Melones Project during certain times of the year. Df. Ex. 2, p. 10 (App. II, 16). Accordingly, it (1) approved the applications filed by the Bureau, and (2) approved the applications filed by the State Department of Finance, and approved their assignment to the Bureau. Df. Ex. 2, pp. 1, 28 (App. II, 8-9, 33).

The State Board attached 25 conditions to the permits. Some conditions, which affect distribution of water, are based on specific provisions found in the congressional acts authorizing the New Melones Project.[5] Another reaffirms the Bureau's contractual obligations arising under its agreements with various California agencies.[6] Another incorporates the Bureau's own estimates of how much water

5. Condition no. 4 requires a preference to be given to water users in the four counties which comprise the water basin in which the New Melones Project is located, and condition no. 25 similarly requires a preference to be given to these four "counties of origin." Df. Ex. 2, pp. 31, 36 (App. II, 35, 40). These conditions echo a provision in the congressional act authorizing the New Melones Project that requires a preference to be given to "all existing and anticipated future needs within that basin," 76 Stat. 1191 (1962), *i.e.*, the basin in which the four countries are located.

6. Condition no. 5 requires that storage releases be scheduled to maintain maximum and minimum concentrations of certain chemical elements in the San Joaquin River, of which the Stanislaus River is a tributary. Df. Ex. 2, p. 31 (App. II, 35). This condition is based on a contractual obligation resulting from an agreement between the Bureau and California agencies, which has been incorporated into California's regional water quality control plans. Df. Ex. 2, p. 11 (App. II, 17).

it needs for selected project purposes.[7] Others require the Bureau to provide the State Board with specified reports, and to provide access to the project by the State Board.[8] Others require the Bureau to provide means to insure the release of waters which exceed those to which the Bureau is entitled.[9] Another provides that the Bureau cannot store water during those periods of the year when unappropriated water is unavailable.[10]

The most important conditions, nos. 1 and 2, defer impoundment of the full amount of water applied for by the Bureau, at least until the Bureau is able to show firm commitments, or at least a specific plan, for the use of the water. Df. Ex. 2, pp. 29-30 (App. II, 33-34). These conditions allow the Bureau to immediately impound water for two project purposes, *i.e.* for water quality control and for the protection of fish and wildlife. Df. Ex. 2, p. 30 (App. II, 34). The conditions also allow the Bureau to use the water

7. Condition no. 2 provides that the Bureau, in storing water for protection of fish and wildlife, can impound no more water than will result in the annual release of 98,000 acre-feet of water. Df. Ex. 2, p. 30 (App. II, 34). This figure is based on the Bureau's own estimates of the amounts of water necessary to protect fish and wildlife. Df. Ex. 2, pp. 20-21 (App. II, 26).

8. Conditions nos. 3, 7, 8, 12 and 21 require further or continuing study by the Bureau of water-related matters, and provide for the submission of specified water-related reports to the State Board. Df. Ex. 2, pp. 30-31, 32, 33, 35 (App. II, 34-35, 36, 39). Conditions nos. 15 and 16 provide for access to the project by representatives of the State Board and the public. Df. Ex. 2, p. 34 (App. II, 37-38).

9. Conditions nos. 17 and 18 require the Bureau to provide means for the release of excess waters, and to clear vegetation and structures from the reservoir site which would interfere with certain project purposes. Df. Ex. 2, p. 34 (App. II, 38).

10. Condition no. 14 prohibits the Bureau from impounding water during periods of the year when unappropriated water is available. Df. Ex. 2, p. 34 (App. II, 37). This condition was apparently upheld by the lower court, since it held that the State Board has jurisdiction to determine the availability of unappropriated water.

so impounded for the additional purposes of power and recreation. *Ibid.* Importantly, the conditions reserve jurisdiction to the State Board to reconsider its conditions when the Bureau is able to show that it has firm commitments for the use of additional water, and in any event no later than 1986. Df. Ex. 2, pp. 32, 37 (App. II, 36, 40).

Conditions nos. 1 and 2, in deferring full impoundment until the Bureau develops a plan for the water, are based on two important findings of fact contained in Decision 1422. First, the State Board found that the Bureau lacks a "specific plan," much less "firm commitments," for the use of water from the project. Df. Ex. 2, pp. 14, 15, 26, 30 (App. II, 19, 21, 31, 34). The lack of such a plan or commitments derives from the fact that the project was authorized by Congress for the purpose of providing water for the East Side Division, a proposed unit of the CVP.[11]

11. The report of the Army Corp of Engineers of March 22, 1962, which led to congressional authorization of the New Melones Project, commented:

> "A large reservoir at the New Melones site on the Stanislaus River could provide cyclic storage for the proposed East Side Division of CVP. This site is one of the few remaining undeveloped large capacity storage sites available in the Central Valley. The East Side Division canal is contemplated as the means for delivering irrigation water to the valley floor and foothill lands along the east side of the San Joaquin Valley." H.R. Doc. No. 453, 87th Cong., 2d Sess. 29 (1962).

The report of the Bureau of Reclamation of August 22, 1960, which also led to congressional authorization of the project, commented:

> "As you know the Bureau is currently engaged in a feasibility study of the East Side Division of the Central Valley Project to bring surplus northern California water to the water deficient area along the east side of the San Joaquin Valley. *The proposed New Melones dam, reservoir, and powerplant,* which we have been jointly studying, *is included as a part of the plan of development for the proposed East Side Division,* and the water and power developed will be integrated into the present and planned future additions of the Central Valley Project. The irrigation and power benefits supplied . . . for the benefit-cost analysis and cost allocation study reflect these assumptions. . . ." *Id.* at 83. (Emphasis added.)

However, this proposed unit has not won, and apparently will not win, congressional approval. Thus, the New Melones Project is apparently unable to serve its original purpose, and the Bureau has yet to devise an alternative plan for the use of project water.

Second, the State Board found that the full impoundment of water sought by the Bureau would have an adverse environmental effect in the Stanislaus River basin. According to the State Board, the impoundment of such waters would inundate approximately 13 miles of river upstream from the dam, thus destroying a 9-mile stretch of whitewater that provides unexcelled opportunities for river rafting; this stretch of whitewater, the State Board found, is the second most heavily used in the nation, and is a "unique asset to the state and nation." Df. Ex. 2, pp. 17-18, 23-24, 26 (App. II, 23, 28-29, 31).

Based on these findings, the State Board concluded:

> "By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. . . . *The limited unappropriated water resources of the state should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future.* When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses." Df. Ex. 2, pp. 15-16 (App. II, 21-22). (Emphasis added.)

Thus, Decision 1422 does not bar the impoundment of water necessary to satisfy the congressionally-authorized purposes of the project. Rather, it authorizes water for

certain purposes, and defers impoundment for other purposes until the Bureau develops a plan to serve those purposes. In fact, the United States recently advised this Court in another case that, concerning the effect of Decision 1422:

> "In any event, even if the State Board's decision is found to be binding on the federal agencies, its only effect would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes were permitted by the Board's decision. *The decision does not render the project useless or fundamentally alter its value.*" Df. Ex. 7, p. 9. (Emphasis added.)[12]

12. This statement was made in a brief to the Court in opposition to a petition for writ of certiorari in *EDF v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974). The statement was based on a letter from the Army Corps of Engineers to Russell Train, then Chairman of the Council of Environmental Quality, which reads in part:

> "It is my understanding that the State board's opinion does not purport to restrict the impoundment of water in the future on the basis of the situation presently existing. The decision merely preserves the board's jurisdiction to decide whether to permit the impoundment for specific purposes at the time such impoundment is scheduled. For example, the decision does not bar the impoundment of water for consumptive use; it merely requires that before any water is impounded, the Bureau show that the benefits of any specific use will outweigh the damage to fish, wildlife and recreation, and that it has a firm commitment to deliver the water. . . . *The board, in its decision, has manifested its awareness of the dynamic nature of these needs.* On p. 27 of its opinion for instance, the board states that, while impoundment 'should not be permitted *at this time,*' 'there is a demonstrated need for the full yield of the project . . . at some time in the future' (emphasis added). At most, therefore, the result of this decision, even if upheld in court, would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes are permitted by the decision. *The decision does not render the project useless, nor does it fundamentally alter the value of the project.*" Df. Ex. 8, p. 2 (App. II, 73-74). (First and third emphases added.)

4. The Proceedings Below.

The United States filed this action for declaratory relief, alleging that (1) the Bureau need not apply to the State Board for the right to appropriate unappropriated water for a federal reclamation project, (2) if the Bureau applies for such a right as a matter of "comity," the State Board must grant the right if unappropriated water is available and cannot attach conditions to the right, and (3) Decision 1422 is void to the extent that it attaches conditions to the water rights granted by the State Board to the Bureau. R. 9 (App. I, 19).

California contends that, (1) under section 8 of the Reclamation Act of 1902, the Bureau must acquire its rights to unappropriated water under state law, and must comply with conditions attached to the rights to the extent that such conditions are not inconsistent with Congress' reclamation laws and policies, or with the purposes of its reclamation projects, (2) the conditions in Decision 1422 are not inconsistent with Congress' reclamation laws and policies, or with the purposes of the New Melones Project, and (3) in any event, the Bureau must comply with conditions attached to State-owned water rights that are assigned to the Bureau. R. 101-106 (App. I, 21-27).

The district court granted summary judgment for the United States. App. I, 42-96. The court ruled that section 8 of the Reclamation Act of 1902 "requires" the Bureau, as a matter of "comity," to comply with the "forms" of state law by obtaining its right to appropriate unappropriated water under state law, thus rejecting the United States' position that it acquires its rights independently of state law. App. I, 68-69, 96. However, the court ruled that the state must grant the right if unappropriated water is available, and cannot attach conditions to the right; it

thus rejected California's position that the Bureau must comply with conditions to the extent that such conditions are not inconsistent with Congress' reclamation laws and policies, or with the purposes of its reclamation projects. *Ibid.* The court did not reach the question whether the conditions in Decision 1422 are consistent with Congress' reclamation laws and policies, or with the purposes of the New Melones Project.

On appeal, the Court of Appeals, relying primarily on the district court's analysis, affirmed the summary judgment. App. I, 28-41. However, the appellate court ruled that section 8 of the 1902 act *requires* the Bureau to comply with the "forms" of state law, and that the Bureau does not do so as a matter of "comity." App. I, 34. The appellate court also ruled that the Bureau is not bound by conditions in water rights that are based on State-filed applications assigned to the Bureau. App. I, 38-41.

SUMMARY OF ARGUMENT

I

Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in acquiring water for federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. The simple, plain meaning of the section, as amplified by its legislative history, indicates that Congress intended to provide for state control of appropriation and distribution of water under the act, a result that was to be achieved by requiring the Secretary to acquire his water rights under state law. Congress provided for state control because water from federal reclamation projects is not consumed by the federal government; rather, it is ultimately consumed by non-federal interests, by agricultural, industrial and municipal groups whose activities are closely linked to the economic growth and development of the western states. Thus, Congress continued and extended the tradition that the western states control the allocation of waters among non-federal users, a tradition which Congress had recognized by the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. Since the passage of the Reclamation Act of 1902, federal agencies have consistently complied with state law in acquiring and distributing water under the act, and have consistently acknowledged their obligation under section 8 to do so.

II

Under the "implied reservation" doctrine, Congress can reserve a federal water right independently of state law, to the extent consistent with its powers under the Commerce and Property Clauses of the U. S. Constitution. In enacting the Reclamation Act of 1902, Congress did not reserve a federal water right. Rather, in enacting section 8, it required the Bureau of Reclamation to acquire its water rights under state law. The United States concedes that the Bureau lacks a reserved water right. Since it lacks a reserved right, it must acquire its water rights under state law, in the same manner as private appropriators.

The lower court, in holding that the Bureau must comply with the "forms" but not the "substance" of the states' appropriation laws, created a new water right, one that is a hybrid of a reserved right and an appropriative right. However, since section 8 specifically provides for state "control" of "use" and "distribution" of water, it clearly requires federal compliance with the "substance" of state laws, and thus does not create a new, hybrid water right.

III

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court held that section 8 requires federal agencies to acquire their water rights under state law, and provides for state control of impoundments and releases of water under the Reclamation Act of 1902. In *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963), this Court held that section 8 does not give the states absolute control of water, and that the states may not interfere with specific, fundamental reclamation laws and policies established by Congress. The *Ivanhoe* and *City of Fresno* analysis, applied in this case, suggests that section 8 should be interpreted as requiring the Bureau to comply with conditions imposed by the state, to the extent that such conditions are not inconsistent with the purposes of Congress' reclamation projects. This approach protects the federal interest in reclamation, by insuring that the states cannot impair that interest. It protects the state interest, by authorizing the states to control federal water appropriations to the extent not inconsistent with overriding national objectives.

IV

The conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project. The congressional act authorizing the project incorporated the federal reclamation laws, which provide that a water right must be consistent with the "beneficial use" of water. The State Board made factual findings, in a proceeding in which the Bureau was a party, that the Bureau had failed to show that its proposed water uses are consistent with the "beneficial use" of water. Since the Bureau failed to seek man-

damus review of the decision, the findings are now final. Thus, the doctrine of collateral estoppel bars the United States from now attacking the findings, and the United States so conceded below.

V

Assuming *arguendo* that section 8 does not require the Bureau to comply with the states' appropriation laws, the Bureau must nonetheless fully comply with such laws when it elects to acquire its water rights under state law. The Bureau obtains an important benefit by acquiring its rights under state law, in that it obtains a recognition and quantification of its water rights without subjecting itself to a general stream adjudication. If the Bureau elects to obtain this benefit under state law, it must also comply with the burdens which the state attaches to the benefit.

VI

Assuming *arguendo* that section 8 does not require the Bureau to comply with the states' appropriation laws, the Bureau must nonetheless fully comply with such laws when it elects to obtain an assignment of state-held water rights. In this case, the state-held rights are based on applications filed by a State agency, and assigned to the Bureau subject to the State Board's approval. The state-held rights constitute a property right of the State. If the Bureau elects to obtain this property right, it is bound, constitutionally, statutorily and equitably, to comply with the conditions which the state attaches to the right.

ARGUMENT

INTRODUCTION

This case raises the question whether the Bureau, in acquiring and using unappropriated water under the Reclamation Act of 1902, must comply with the states' appropriation laws. The primary question is not whether Congress has constitutional authority to exempt the Bureau from the states' laws. Rather, it is whether Congress has chosen to exempt the Bureau from such laws. Thus, the primary question is not what Congress can do, but what Congress has done.

We shall see that Congress, in enacting section 8 of the Reclamation Act of 1902, required the Bureau to comply with the states' appropriation laws. Its goal was to provide for state control of the appropriation and distribution of water under the act. It achieved that goal by requiring the Bureau to be treated as an appropriator under the states' laws. No other conclusion is possible from the language, legislative history, surrounding historical circumstances and administrative interpretation of section 8. The reason that Congress provided for state control is that water under the 1902 act, although developed by federal projects, is ultimately distributed to local economic and municipal entities, and thus affects vital state interests.

The lower court held that, under section 8, the Bureau has absolute control of the use and distribution of water under the act. Its decision, by depriving the states of any control of water that is ultimately used by non-federal interests, mutes the states' voice in matters that affect their destiny. The lower court was apparently fearful that the states, if allowed to control federal water rights, might be able to impair Congress' reclamation objectives. However,

a proper interpretation of section 8 allows the states to control federal water rights only to the extent not inconsistent with Congress' reclamation objectives, and thus removes any basis for a fear that national interests will be overridden by state interests. Moreover, the states have historically controlled federal water rights under the 1902 act, as the Bureau has in fact complied with state law in acquiring and using unappropriated water under the act; rather than impairing federal reclamation interests, the states have accommodated such interests by granting preferential treatment to federal water rights. Thus, the states have neither the power nor the inclination to interfere with overriding national goals in the field of reclamation.

I. SECTION 8 OF THE RECLAMATION ACT OF 1902, VIEWED IN LIGHT OF ITS LANGUAGE, LEGISLATIVE HISTORY, SURROUNDING HISTORICAL CIRCUMSTANCES AND ADMINISTRATIVE INTERPRETATION AND PRACTICE, PROVIDES FOR STATE CONTROL OF APPROPRIATION AND DISTRIBUTION OF WATER UNDER THE ACT.

Early in this century, Congress turned its attention to the task of reclaiming the newly-settled lands of the American West. Since nature had deprived the lands of a plentiful water supply, a major reclamation effort was necessary to make the lands productive and habitable. Congress decided to undertake reclamation on a national level, by enacting the Reclamation Act of 1902, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* The act provides for federal construction and operation of reclamation facilities that will divert and store waters for distribution to farms, communities and industries in the western states.

Section 8 of the act describes the manner in which the Secretary of the Interior, who is to operate the projects, must comply with state water laws. It provides:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the *laws of any State* or Territory relating to the *control, appropriation, use, or distribution of water* used in irrigation, or any vested rights acquired thereunder, and the *Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and *beneficial use* shall be the basis, the measure, and the limit of the right." 32 Stat. 388, 390 (1902), 43 U.S.C. §§ 372, 383 (1970). (Emphasis added.)[13]

A. SIMPLE, PLAIN MEANING OF SECTION 8.

The meaning of section 8 is clear on its face. It requires the Secretary of the Interior, in carrying out his responsibilities under the 1902 act, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. Thus, the section requires the Secretary to acquire his water rights under the states' "appropriation" laws, and subjects his rights to state "control" of the "use" and "distribution" of water. Rather than authorizing the secretary to acquire his water rights independently of state law, the section treats the Secretary as an appropriator under the states' appropriation laws, by requiring him to obtain his water rights in the same manner as

13. Although § 8 pertains only to water for "irrigation," it is made applicable to other purposes of multi-purpose projects by the usual congressional directive that the project is to be operated "pursuant to the Federal reclamation laws," a directive found in the act authorizing the New Melones Project. 76 Stat. 1191 (1962).

other appropriators. In this way, the section provides for state control of appropriation and distribution of water developed under the act.[14]

The lower court properly held that section 8 requires the Secretary to acquire his water rights under the states' appropriation laws. However, the court held that the Secretary need only comply with the "forms," not the "substance," of such laws. Nothing in section 8 supports the court's distinction between the "forms" and "substance" of the states' appropriation laws. In fact, the words "form" and "substance" do not even appear in the section. The distinction between "form" and "substance" is the product of the lower court, not of Congress.

B. LEGISLATIVE HISTORY OF SECTION 8.

The simple, plain meaning of section 8, that the states are to control the appropriation and distribution of water under the 1902 act, appears even more clearly from the legislative history of the section.

14. This conclusion is supported by other language in § 8. The section provides that the right to use water under the act exists only to the extent that the water is put to a "beneficial use." As will be discussed later, the "beneficial use" concept is the central feature of the states' appropriation laws, in that an appropriative right exists under state law only to the extent that the state determines that the appropriator will put the water to a "beneficial use." See pages 31-33, *infra*. The "beneficial use" concept has no other significance under federal law, as the federal government does not grant appropriative rights and hence does not determine the "beneficial use" of water. In fact, the "beneficial use" provision was inserted in § 8 because Congress wanted to insure a "perfection and uniformity" of state water laws. H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7-8 (1902); 35 Cong. Rec. 6679, 57th Cong., 1st Sess. (1902) (Cong. Mondell). Thus, the section contemplates that the states will determine, as they do with other appropriators, whether the Secretary's water uses are consistent with the "beneficial use" of water, and will thereby determine the extent to which the federal right exists.

1. Construction and Operation of Projects.

In passing the 1902 act, Congress was primarily concerned with whether the projects should be built and operated by the federal government, or by the states. In answering this question, Congress focused on whether reclamation was primarily a national or local function. Those who opposed the act's passage, all from states which received no direct benefits from the act, argued that reclamation was a local function that should be undertaken by the states themselves; the federal contribution, at most, should be limited to ceding lands to the western states for this purpose. See 35 Cong. Rec. 6682 (Cong. Ray), 6731-6732 (Cong. Robinson). See generally *id.* at 6673 (Cong. Shafroth), 6673 (Cong. Newlands), 6702-6707 (Cong. Lanham), 6737 (Cong. Dalzell).[15] However, those who supported the act's passage, particularly representatives from the western states that stood to benefit most from the act, argued that reclamation was a national function, in the sense that the projects should be built by the federal government. *Id.* at 6706, 6676 (Cong. Mondell), 6673, 6734 (Cong. Newlands), 6673 (Cong. Shafroth), 6740 (Cong. Reeder), 6775 (speech of President Roosevelt); H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3-4 (1902). The latter group argued that the western states lacked the financial capacity to build the projects, and thus that the reclamation effort would not succeed without a national

15. All references to the Congressional Record herein, unless otherwise indicated, are to proceedings of the 57th Congress, 1st Session, in 1902.

The view that lands should be ceded to the western states, so that they could undertake their own reclamation projects, was the basis of several reclamation bills unsuccessfully introduced in Congress prior to 1902. See, *e.g.*, H.R. 13846, 56th Cong., 2d Sess. (1901); H.R. 6790, 52d Cong., 1st Sess. (1892); Df. Ex. 6, pp. 62-66, 68, 81, 83-94.

undertaking. *Ibid.* The latter view prevailed, and Congress voted to provide for the construction and operation of the projects by the federal government, rather than by the states.

The lower court[16] relied on the above discussion for its conclusion that section 8 does not authorize the states to control federal water appropriations under the act.[17] The court failed to note that the discussion addressed only the question whether the federal government or the states should build and operate the projects, not whether the federal government or the states should control the appropriation and distribution of water developed by the projects. See note 17, *supra.* The court apparently assumed that, since the federal government was to build and operate the projects, it should control the appropriation and distribution of project water. This conclusion,

16. Since the appellate court largely endorsed the analysis provided by the district court, references herein to the lower court may include references to either the appellate court or the district court. Such references will be clarified, where appropriate, by references to the appendix.

17. The court rested its conclusion largely on its observation that "time and again during the Congressional debates, the supporters of the 1902 Act made clear the understanding that reclamation was a ***national*** project to be undertaken by the federal government." App. I, 62. (Emphasis in the original.) The court cited the statements of Congressmen Reeder and Newlands in support of that observation. App. I, 62-63; 35 Cong. Rec. 6734, 6740. However, the court failed to note that the statements of Reeder and Newlands were addressed to the question whether the federal government should build and operate the projects, not whether the federal government or the states should control the appropriation and distribution of project water. Congressman Reeder, according to the statement cited by the court, was merely providing an "answer" to those who claimed that the federal government "should not reclaim them [the public lands] itself, but should cede them to the States." App. I, 62; 35 Cong. Rec. 6740. Congressman Newlands merely advanced the same argument, stating, in the passage cited by the court, that "nothing can be accomplished by conveying this land to the States." App. I, 62; 35 Cong. Rec. 6734.

aside from the fact that it is a *non sequitur,* ignores the lengthy congressional discussion concerning the control of such water, which shall now be examined more fully.

2. Control of Appropriation and Distribution of Water.

In the next few pages, we will describe at length the congressional discussion relating to the control of water under the 1902 act. To summarize the discussion, those who opposed the act argued that, if the federal government is to build and operate the projects, it should control the appropriation and distribution of water developed by the projects; if reclamation is a national function for some purposes, it is a national function for others. Others, including the western representatives who drafted and most vigorously supported the act, argued that this control should rest with the western states, not with the federal government. This control should be exercised, they argued, by requiring federal authorities to obtain their water rights under the states' appropriation laws, just as private appropriators are required to do. They argued that the western states would be vitally affected by the use of such water, since such water is not to be consumed for normal federal purposes on federal lands; rather, it is to be consumed by non-federal, primarily agricultural, interests on non-federal lands. They pointed out that the western states had traditionally controlled the use of water by non-federal users, a tradition recognized by Congress in acts passed in 1866, 1870 and 1877; hence, they argued, the states should have the same control over water uses under the 1902 act. The proponents of state control prevailed. They succeeded in having section 8 included in the final reclamation bill, which requires the Secretary of the Interior to be treated as an appropriator under the states' appropriation laws.

a. The President's Position.

President Theodore Roosevelt was among the first to advocate passage of a national reclamation bill that would provide for state control of water. He expressed this position in his annual speech to Congress in 1901, stating:

> "Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it best be accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a national function, in at least some of its features.
>
> . . .
>
> "These irrigation works should be built by the National Government. . . . *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation." 35 Cong. Rec. 6775. (Emphasis added.)

b. The Senate Debate.

A similar theme was echoed during the Senate's consideration of the reclamation bill, S. 3057.[18] Senator Clark of Wyoming, the chief senatorial spokesman for the bill, spoke in favor of section 8 by disclaiming the notion that

---

18. The Senate report stated that § 8 provides that "there is to be no interference with State or Territorial laws on the subject of irrigation." S. Rep. No. 254, 57th Cong., 1st Sess. 2 (1902).

"a great Government Bureau . . . shall have control of all the lands and waters in our arid regions." *Id.* at 2222. He further stated:

> "The question of conservation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import; but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition. . . . *It is right that the General Government should control, should conserve, and should reservoir the head waters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution.* The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another.
>
> *"Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities.* To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. *They are the men qualified to deal with the question,* the laws written upon their statute books and read of all men, and in everyone of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer...." *Ibid.* (Emphasis added.)[19]

19. The lower court acknowledged that section 8, as passed by the Senate, contained a "strong States' rights provision." App. I, 59. However, the court stated that its meaning was changed by an amendment prior to House consideration of the bill. *Ibid.* In fact, the amendment was merely intended to prevent upstream states from inhibiting the flow of interstate waters to users in downstream states, and, since the waters of the CVP are wholly intrastate, the amendment has no effect on the CVP. A thorough analysis of the amendment, which is too lengthy to be appropriately included in the body of our brief, appears in an appendix at the end of this brief.

c. The House Debate.

The major spokesman for the bill in the House was Congressman Mondell of Wyoming. After arguing that the reclamation effort "can only be undertaken and accomplished by the National Government," 35 Cong. Rec. 6676, Mondell pointed out that the bill required the Secretary of the Interior to acquire his water rights under state law. He stated:

> "I can perhaps best illustrate . . . [the bill's] workings by indicating how the Secretary of the Interior as the agent of the Government under this act, would proceed. . . . It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, *the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located.*" *Ibid.* (Emphasis added.)

Mondell's statement clearly shows that, under section 8, federal officials must acquire their water rights under the states' appropriation laws. However, the lower court suggested that the "forms" of the states' laws, as mentioned by Mondell, might be something different from the "substance" of their laws; his statement can thus be construed, the court stated, as exempting federal officials from the obligation to comply with the "substance" of state laws.

Ibid. The court concluded that the conditions attached to federal water rights are the "substance" of the states' laws, and thus that the Bureau need not comply with the conditions. *Ibid.*[20] However, Mondell and other congressmen made other remarks that indicate that no distinction was intended between "form" and "substance." These additional remarks, which shall now be described, were wholly ignored by the lower court.

Mondell stated that section 8, beyond requiring the Secretary to acquire his water rights under state law, would allow the states to control the use and distribution of water under the act. He described the section's effect by quoting with approval the Republican political platform of 1900, to the effect that:

> "In further pursuance of the constant policy of the Republican party to provide free homes on the public domain, we recommend adequate national legislation to reclaim the arid lands of the United States, reserving *control* of the *distribution* of water for irrigation to the respective States and Territories." 35 Cong. Rec. 5676. (Emphasis added.)[21]

He also quoted with approval the statement of President Roosevelt in his 1901 congressional message, to the effect that:

> "These irrigation works should be built by the National Government, [but] *the distribution of the water,*

20. The district court stated that the Secretary "must" follow the "forms" of state law as a matter of "comity," App. I, 68-69, 96, ignoring the fact that one cannot be required to do that which he does as a matter of "comity." The appellate court stated that the Secretary is *required* to follow this procedure under § 8. and that he does not do so as a matter of comity. App. I, 34.

21. Many other congressmen cited the passage in the Republican Platform as explaining the meaning of section 8. See 35 Cong. Rec. 6672, 6673 (Cong. Shafroth), 6748 (Cong. Glenn), 6752 (Cong. Jones), 6743 (Cong. Mercer).

> *the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws,* and without interference with those laws or with vested rights." *Id.* at 6677. (Emphasis added.)

Mondell proposed a motto of "national expenditure, local administration" for the bill. *Ibid.* He further stated:

> "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the *appropriation and distribution* of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws." *Id.* at 6678. (Emphasis added.)

Mondell stressed that section 8, in allowing the western states to control the appropriation and distribution of water under the 1902 act, would continue the tradition of state control which Congress had recognized and approved by the passage of the Mining Acts of 1866 and 1870, and the Desert Land Act of 1877.[22] Mondell stated:

> "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the *appropriation and distribution* of water used in irrigation, and it has been deemed wise to continue our policy in this regard." *Id.* at 6679. (Emphasis added.)

In response to a question on "the subject of national or State control," he stated:

> "Now, as to *State control over appropriation and distribution* of water, I will say to the gentleman that there is no reasonable ground for disagreement on that point. We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along one line. The President in his

22. The Mining Acts of 1866 and 1870 and the Desert Land Act of 1877 are discussed more fully at pages 32-33, *infra.*

message declared in conformity with all the legislation which had preceded. The Republican platform declared in conformity with that legislation." *Ibid.* (Emphasis added.)

He stressed that section 8 was consistent with the "acts of 1866, 1870 and 1877" in "recognizing the *control* of the States over the *use* of waters within their borders." *Ibid.* (Emphasis added.) Thus, Mondell could not have expressed more clearly the view that the states are to control the appropriation and distribution of water under the 1902 act, just as they had traditionally controlled the appropriation and distribution of water under the 1866, 1870 and 1877 acts.

Other supporters of the bill, whose voices were also ignored by the lower court, spoke in a similar vein. Congressman Sutherland stated:

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the *use* of these waters under the *local laws and regulations of the State* than have resulted by the use of other waters or property.

. . .

"The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that *the appropriation and use of the water is under the State law* has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and

disposed of and it must be occupied and held under and in accordance with the law of the State." *Id.* at 6770. (Emphasis added.)

Congressman Burkett, another supporter of the bill, stated:

"I might say in passing, for the benefit of those who are unfamiliar with the real origin of this particular bill . . . that it is the *compromise* of contending opinions upon the questions. It is the bill of the united West. It perhaps is not exactly anyone's bill. It goes further than some would have gone in some particulars, and on the other hand falls very far short of where others would have it go in other particulars. . . . The Government probably could not undertake to distribute the water to the user, for conditions of water use will vary in different localities. The law that would be appropriate in one community or in one State might not be adequate in another condition. *Distribution should be . . . regulated and controlled by State laws and by State boards of engineers.*" *Id.* at 6728. (Emphasis added.)

Another of the bill's proponents, Congressman Martin, argued in favor of the bill's constitutionality by asking:

"Why cannot the Government, merely as a landowner within the State, do the same as an individual—reclaim its own lands by irrigation projects *under State laws?*" 35 Cong. Rec. 6760. (Emphasis added.)

Thus, it was clearly understood, both in the Senate and the House, that section 8 would not only require the Secretary to acquire his water rights under state law, but would also enable the western states to control the use and distribution of water under the 1902 act. No member of Congress, even among those who opposed the section, offered a different interpretation. No one suggested that the Secre-

tary was free to ignore the "substance" of the states' appropriation laws.

The congressional supporters of section 8, many of whom hailed from the western states, believed that they were preserving broad authority to the states to decide how their waters should be used under the act. This was a matter of importance to the states, since the water was to be used by non-federal interests whose activities affect the economic growth and development of the states. The lower court, by its facile distinction between the "form" and "substance" of the states' laws, has nullified virtually everything that these congressmen meant to accomplish. This distinction limits the states to the ministerial function of granting the federal water right once it is mathematically calculated that unappropriated water is available for the project; it divests the states of discretion to control the allocation of water to the non-federal users who are the ultimate recipients of the water, no matter how much such allocations may affect state interests. In a word, the court's decision provides for absolute federal control of the use and distribution of water under the act. This is, of course, the result that was urged by the congressional opponents of section 8, and that was opposed by the congressional supporters of the section. Thus, the lower court, by exempting the Bureau from the "substance" of the states' appropriation laws, has reached a result opposite to that intended by Congress. It has undertaken to re-write history, by substituting its own reclamation philosophy for that of Congress. If the accommodation between federal and state interests worked out by Congress is to be changed, such is the task of Congress, not the courts. As this Court has stated in construing federal statutes, "our task here is a narrow one," for "we cannot

remake history." *DeCoteau v. District Court*, 420 U.S. 425, 449 (1975).

C. HISTORICAL CIRCUMSTANCES SURROUNDING ENACTMENT OF SECTION 8.

In order to understand why Congress chose to provide for state rather than federal control of water under the 1902 act, it is helpful to understand the historical tradition that recognizes the states as the source of water rights in the West, a tradition recognized by Congress in the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877.

The common law doctrine of riparian rights, which entitles a landowner to the use of water appurtenant to his land, is the historical basis of water law in the eastern states. However, the discovery of gold in California triggered a chain of events that led to the development of a new water law in the western states, the doctrine of prior appropriation. Under this doctrine, the first person to put water to a beneficial use has a prior right to the use of the water, as long as the beneficial use continues. This doctrine evolved from the customs of the early mining camps, where the first miner to divert water to his claim was recognized as having prior rights as against miners who appeared later on the scene. This custom was soon recognized by local courts. The appropriation doctrine was well-suited to the settlers who arrived in the West, for it provided the most efficient use of the West's sparse waters; it was rooted in simple necessity, not abstract theory. The doctrine has been adopted by all western states, and is the foundation of modern western water law. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-750 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142,

153-157 (1935); *Jennison v. Kirk*, 98 U.S. 453, 456-461 (1878).

Early court decisions held that the water rights of California's miners, which were based on local law and custom, might be subject to the paramount rights of the United States, since the United States acquired original ownership of the waters of California as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). See *Irwin v. Phillips,* 5 Cal. 140 (1885). Accordingly, it was feared that the miners' rights might be inferior to the rights acquired by settlers under federal laws, such as the Homestead Act, 12 Stat. 392 (1862). To resolve these doubts, Congress passed the Mining Act of 1866, 14 Stat. 251, 253, as amended in 1870, 16 Stat. 217, 218, which protected the miners' claims to the extent that they were based on "local customs, laws, and the decisions of the courts." *California Oregon Power Co. v. Beaver Portland Cement Co., supra* at 153-157. Congress later enacted the Desert Land Act of 1877, 19 Stat. 377, to provide lands to anyone willing to settle on the arid lands of the West. The latter act provided that the settlers' water rights "shall depend upon bona fide prior appropriation," and that surplus waters not acquired by the settlers are "free for the appropriation and use of the public...." *Ibid.* In *California Oregon Power Co. v. Beaver Portland Cement Co., supra,* this Court held that the 1877 act, if not the 1866 and 1870 acts, "severed" the waters from the lands of the public domain, and thus required all water users, whether claiming under federal laws or not, to acquire their water rights in the western states under the states' appropriation laws. *Id.* at 158-162.[23] The decision

23. The Court stated:

"What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." 295 U.S. at 163-164.

thus recognized the states' appropriation laws as the source of water rights in the West. See generally *California Oregon Power Co. v. Beaver Portland Cement Co., supra; Ickes v. Fox*, 300 U.S. 82, 95 (1937).

With increasing demands upon the limited waters of the western states, the states became conscious of the need to regulate the allocation of water among competing users, rather than merely recognize water rights based on priority of use. Wyoming adopted a permit system in 1891, under which an appropriator is required to obtain a permit from State authorities as a condition of his appropriative right; the permit could not be issued if Wyoming authorities deemed the proposed use to be "detrimental to the public interest." 2 Wiel, *Water Rights in the Western States* 1551, 1557-1558 (3d ed. 1911).[24] Most other western states, following the Wyoming example, also adopted permit systems.[25]

24. The Department of the Interior noted that, contemporaneously with the passage of the Reclamation Act of 1902, the states of Idaho, Nevada and Utah had also adopted permit systems under which "an application must be made to the State engineer for permission to make an appropriation." U.S. Dept. of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 223-224 (1905) (App. II, 120-122).

Moreover, many states that lacked permit systems in 1902 nonetheless had statutory schemes that provided for at least partial control of water allocations. For instance, California, which did not adopt a permit system until 1914, Cal. Wat. Code § 1202, had developed a statutory scheme in the 1850's for the allocation of water among competing mining and agricultural interests. Hutchins, *California Law of Water Rights* 47-48 (1956 ed.).

25. Of the nineteen western states, all but three require an appropriator of surface water to obtain an appropriative permit from the state. I Hutchins, *Water Rights Laws in the Nineteen Western States* 302 (1971). The exceptions are Hawaii, Colorado and Mon-

Thus, the permit system is the essence of the appropriation laws of most western states. As the western states control the acquisition and use of water, the permit system is the mechanism by which this control is exercised.

The lower court concluded that Congress did not have California's permit system in mind in enacting section 8 in 1902, since California's permit system was not adopted until 1914. App. I, 32-33. This conclusion is a *non sequitur*. It ignores the fact that other states subject to the 1902 act, following Wyoming's example, adopted permit systems *prior* to 1902. Since some states had adopted permit systems prior to 1902, it is irrelevant, in interpreting section 8, that other states had not. The court's logic would carry it to the absurd result that Congress meant for federal agencies to comply with permit systems in some states but not others, depending on whether the permit system was adopted prior to 1902.[26] In any event, Congress adopted a supplementary reclamation law in 1956 that reaffirms the Bureau's obligation to "proceed in conformity with" state laws relating

tana. *Ibid.* Hawaii, which is not an arid state, does not recognize the appropriation doctrine. *Ibid.* Colorado provides a system of statutory adjudication for the acquisition of appropriative rights, rather than an administrative system. *Ibid.* Montana provides for the acquisition of appropriative rights by either statutory adjudication or by posting of notice and filing of records. *Ibid.*

26. In fact, the congressional report accompanying the 1902 act noted that § 8 would "encourage" the western states to adopt more "perfect and uniform" water laws. H. R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902). See also 35 Cong. Rec. 6679 (Cong. Mondell). Similarly, the Reclamation Service, the Bureau's predecessor, expressed the view in 1902 that its reclamation function would be advanced by the adoption of more "uniform systems of laws in the various States. . . ." U. S. Dept. of the Interior, *Third Annual Report of the Reclamation Service*, 1903-04 (2d ed.) 31-32 (1905) (App. II, 126). Thus, the western states, in developing nearly-uniform permit systems to replace their antiquated water laws, did exactly what Congress and the executive branch encouraged them to do.

to the "control, appropriation, use, or distribution" of water under the 1902 act. Section 4, Reclamation Project Act of 1939, as amended, 70 Stat. 484 (1956), 43 U.S.C. § 485h-4 (1970).[27] Since the statute was enacted after California adopted its permit system in 1914, the statute clearly and unambiguously requires the Bureau to comply with California's permit system, assuming *arguendo* that section 8 does not.

Thus, the western states traditionally controlled the acquisition and use of water by non-federal users, a tradition recognized by Congress in the acts of 1866, 1870 and 1877. Since water under the 1902 act is also distributed to non-federal users, Congress continued the tradition of state control with respect to water under that act. In this way, Congress achieved an historical continuity in the control of the West's water, thus avoiding a departure from past traditions rooted in the history of the West.

---

27. On other occasions, Congress has reaffirmed the principle of state control found in § 8. For instance, the Flood Control Act of 1944, which authorizes the New Melones Project, provides that it is the "policy of Congress to recognize the interest and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 58 Stat. 887-888, 889 (1944).

In enacting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to general stream adjudications in state courts, Congress described the effect of § 8 thusly:

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary controls thereof. . . .
>
> • • •
>
> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).

D. ADMINISTRATIVE PRACTICE UNDER, AND INTERPRETATION OF, SECTION 8.

The administrative practice of federal agencies under the 1902 act shows that Congress was successful in its effort to provide for state control of water. Federal agencies have consistently complied with the states' appropriation laws, including their permit systems, in acquiring and using unappropriated water under the act. See Df. Ex. 1 (App. II, 1-4); Df. Ex. 9, 9(a), 9(b) (R. 407-415, 512-518); "Federal-State Water Rights," Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Sen. Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 320, 322, 323 (1964) (R. 490-503); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 n. 9, 740 n. 14 (1950). In California, the Bureau has acquired 41 appropriative permits since 1938, and, until this case, has consistently complied with conditions in the permits; in fact, it has never acquired unappropriated water in California except pursuant to the permit process. Df. Ex. 1 (App. II, 1-4). It has modified its permit applications in another state, after the state determined that the proposed federal uses were not in the public interest. See Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 468 (1960). The significance of this administrative conduct, of course, arises from the rule of statutory construction that requires great weight to be given to the manner in which a statute is interpreted and applied by the agency charged with its enforcement. See, *e.g., Zemel v. Rusk,* 381 U.S. 1 (1965); *Perkins v. Matthews,* 400 U.S. 379, 391 (1970).

The district court stated that the administrative practice of the Bureau could be construed as supporting the United States' view that the Bureau acquires its water rights under state law as a matter of "comity." App. I, 88-89.

It is perhaps remarkable that an unbroken pattern of administrative conduct, spanning three-quarters of a century, could be attributed to administrative courtesy rather than legislative direction. In any event, the court's view is inconsistent with statements made by federal reclamation officials in interpreting their obligation under section 8, as shall now be seen.

Shortly after the 1902 act was passed, the Reclamation Service, the Bureau's predecessor, noted:

> "In order to carry out the provisions of this section [section 8], careful study must be made of the effect of State laws upon each project under consideration in that particular State. It appears probable that in some of the States radical changes in the laws must be made before important projects can be undertaken." H.R. Doc. No. 44, 58th Cong., 2d Sess. 33 (1904) (App. II, 125).[28]

The Reclamation Service then conducted a survey of the appropriation laws of the western states, and noted that "an application must be made to the State engineer for permission to make an appropriation" in those states, Idaho, Nevada, Utah and Wyoming, which had adopted permit systems. U.S. Dept. of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 223-225 (1905) (App. II, 120-123). Later, it noted:

> "It is very important to secure as nearly a uniform system of laws in the various States as may be consistent with the different physical conditions, and it is believed that as time goes on the State laws will be brought into greater harmony with one another and with the necessities of irrigation development." H.R.

---

28. As will be seen, many western states have in fact made such changes in their appropriation laws, by affording preferences to federal water rights under the 1902 act. See note 45, *infra.*

Doc. No. 28, 58th Cong., 3d Sess. 32 (1905) (App. II, 126).

Similar statements were made in later decades. In 1948, the Bureau advised Congress, in relation to the CVP, that "reclamation law . . . recognizes State water law and rights thereunder," and that "Bureau filings are subject to State approval." 95 Cong. Rec. A961, 81st Cong., 2d Sess. (1948). In 1952, the Secretary of the Interior notified California's Governor Earl Warren that "the rights of the United States to store, divert, and use water under California law . . . have their inception in certain applications by the California Director of Finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 810-812 (1956). [29]

---

29. In 1950, Congress received a memorandum from the Commissioner of Reclamation, a copy of which was also submitted to this Court for its deliberations in the *Gerlach* case. The memorandum stated:

> "Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with State water laws; they do so proceed; and they would strenuously oppose any change in the Federal law which now requires them to proceed in conformity with State water laws.
>
> • • •
>
> "Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law." "Federal-State Water Rights," Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Senate Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 322, 323 (1964) (R. 490.)

The Bureau's own operating instructions, currently in effect, recognize its obligation to comply with state law. Its instructions provide:

> "State and Federal law and policy establish the framework of project formulation. Project plans must comply with State legal provisions or priorities for beneficial use of water. . . . In some cases, . . . State laws . . . have been modified to meet specific conditions in the authorization of particular projects.
>
> • • •
>
> *"The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources* and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, *it is necessary to reach an understanding with the States regarding reservoir operating limitations.*" U. S. Bureau of Reclamation, Dept. of the Interior, "Reclamation Instructions," §§ 116.3.1, 231.5.1. (Emphasis added.)

Perhaps the clearest statement of the historic federal position was expressed by the Commissioner of Reclamation in 1975:

> "We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to State law is one of the key elements of past, present, and future development in the West. *Each state has the duty to determine under its own statutes how its unappropriated water is to be used.* Since 1902, the Bureau has consistently taken the position that it will obtain under State law its rights to store and divert water for its projects recommended

for Congressional authorization." Df. Ex. 13, p. 4 (App. II, 105). (Emphasis added.)[30]

The lower court, by providing for federal rather than state control of water under the 1902 act, has thus altered several decades of settled administrative practice. It has freed the Bureau of conditions which the western states, in exhaustive hearings extending over many decades, have developed in order to insure the best possible use of water from federal reclamation projects, thereby nullifying an extraordinary amount of planning effort which the states have undertaken at the Bureau's own request. It has thus undermined the historic relationship that has guided federal and state agencies in the field of reclamation since 1902. We do not ask this Court to establish a new, untested relationship between these entities. Rather, we ask that the historic, proven relationship be continued.

II. THE BUREAU OF RECLAMATION LACKS A RESERVED WATER RIGHT WITH RESPECT TO THE NEW MELONES PROJECT, AND HENCE MUST COMPLY WITH CALIFORNIA'S APPROPRIATION LAWS.

We noted earlier that the western states traditionally controlled the acquisition and use of water. See pages 31-35, *supra*. Their control is subject to two overriding constitutional limitations, as recognized by this Court. First, it is limited by Congress' powers, under the Commerce Clause, to reserve water for the purpose of promoting the navigability of navigable waters. U. S. Const., Art. I, § 8; *Kansas v. Colorado*, 206 U.S. 46, 86 (1907); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Second, it is limited by Congress' powers, under the Property Clause, to reserve water for use on federal lands withdrawn from the public domain. U.S. Const., Art. IV, § 3; *Kansas v. Colorado, supra* at 86; *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976); *Arizona v. California*, 373 U.S. 546, 599-600 (1963); *United States v. District Court*, 401 U.S. 419 (1971). Thus, Congress has constitutional authority to reserve a federal water right independently of state law, to the extent consistent with its commerce and property powers. The courts have fashioned a presumption that, where Congress has not spoken otherwise, Congress impliedly intends to reserve water sufficient to serve the purposes of federal lands withdrawn from the public domain, a presumption known as the "implied reservation" doctrine. See *Cappaert v. United States, supra* at 138-142.

A. ABSENCE OF A FEDERAL RESERVED RIGHT.

Section 8 overcomes any presumption that Congress intended to create a federal reserved water right under the Reclamation Act of 1902. That section, viewed in light of its language and legislative history, indicates that Congress intended for federal authorities to acquire their water rights under state law, and intended for the states to control the acquisition and use of water under the act. Thus, the "implied reservation" doctrine is not applicable in the field of reclamation.[31] In fact, this Court has held that "it

30. The Commissioner's statement claims, however, that the States "cannot unilaterally dictate daily operations of the Federal facilities nor unilaterally dictate future changes in authorized uses." *Ibid.* We do not assert the right, of course, to "dictate" the daily operation of a project or changes in authorized uses, except to the extent related to the "beneficial" and "reasonable" use of water and not inconsistent with specific federal reclamation laws or congressionally-authorized project purposes.

31. Even if the "implied reservation" doctrine is applicable in the field of reclamation, it is not applicable under the facts of this case. That doctrine is only applicable to water necessary to serve "lands withdrawn from the public domain." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). However, the lands on which the New Melones Project is being built were acquired by purchase and

is not proper to analogize" federal rights under the Reclamation Act of 1902 to federal reserved rights under the "implied reservation" doctrine. *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945); see *Ickes v. Fox*, 300 U.S. 82, 95 (1937).[32] As shall now be seen, there are two important considerations of public policy that, we believe, explain and justify Congress' decision to provide for state control of water.

1. Distribution of Water to Non-Federal Interests.

First, under the 1902 act, water is not used on federal lands for traditional federal purposes, as in those cases which have arisen under the "implied reservation" doctrine.[33] Rather, such water, after being diverted and stored by the federal government, is ultimately distributed to, and used by, non-federal users on non-federal lands; it is consumed by the farmers, industries, cities and villages that comprise the body politic of the state. The federal government is a conduit, not a consumer, of the water. *Ickes v. Fox*, 300 U.S. 82, 95 (1937). Hence, the federal

condemnation, not by withdrawal from the public domain. Df. Ex. 3(a), 3(b), 3(c), 3(d) (App. II, 43, 52, 60, 64).

Nor can the United States claim the right to reserve water for the CVP pursuant to its navigation powers under the Commerce Clause. This Court held, in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 731-742 (1950), that the CVP was authorized for purposes of reclamation, not navigation. Hence, the United States' navigation powers do not allow it to ignore California law in acquiring water for the CVP.

32. In *Kansas v. Colorado*, 206 U.S. 46, 92 (1907), the Court stated that "we do not mean that its [Congress'] legislation can override state laws in respect to the general subject of reclamation."

33. In the "implied reservation" cases decided by this Court, water was used by the federal government on lands set aside for national forests, national wildlife refuge areas, national recreation areas, Indian reservations, and so forth. See *e.g., Cappaert v. United States, supra; Arizona v. California, supra; United States v. District Court, supra.*

interest is less apparent than in those cases which have arisen under the "implied reservation" doctrine. Conversely, the state interest is proportionately greater. The states' economic and political development is strongly influenced by the use of water by non-federal interests, by its allocation among competing agricultural, municipal and industrial interests. Moreover, the western states traditionally controlled the allocation of water among such non-federal interests, a tradition recognized by Congress in the Desert Land Act and earlier acts. See pages 31-35, *supra*. In short, water uses under the 1902 act are more analogous to water uses traditionally controlled by the states, than to federal water uses under the "implied reservation" doctrine. This is, we believe, the main reason why Congress chose to provide for state rather than federal control of water under the act.

2. Qualification of the Federal Water Right.

Second, if the "implied reservation" doctrine were applicable in the field of reclamation, the western states would be unable to quantify the federal water right, and would thus be unable to effectively manage and allocate their waters even among non-federal users. This result would inject immeasurable confusion and uncertainty into western water law.

The states' appropriation laws, consisting of their permit systems, not only provide a method for the states to control water allocations; they also provide a method for the states to administratively quantify the amount of unappropriated water that should be granted to an applicant, and thus to quantify the amount of unappropriated water that remains available for use by others. However, if the Bureau need not acquire its water rights under state laws, the states would

be unable to administratively quantify the amount of unappropriated water taken by the Bureau. In the present case, for example, the State Board would be unable to determine the rate at which the Bureau can lawfully divert water for the New Melones Project, the seasons during which the diversions can be made, and so forth. The only other method for quantifying the federal right would be by adjudicating such rights in relation to those of competing users, a process that is inordinately unwieldy and protracted.[34] The states would thus lack a ready, efficient method for quantifying the amount of unappropriated water that is available for non-federal users, and thus would not know whether to grant or deny the applications of such users.[35] Moreover, non-federal users who have already acquired appropriative rights under state law would lack assurance that the Bureau might not subsequently claim the water necessary to satisfy their rights, on grounds that the Bureau acquired senior rights to an unquantified amount of water under the "implied reservation" doctrine.

34. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963). For example, the United States brought an action against thousands of competing users in 1913 to quantify its water rights in the Truckee River in Nevada; the proceeding was not completed until 1944, more than three decades later. See *United States v. Orr Water Ditch Co., et al.*, Equity No. A-3 (D. Nev. 1944).

35. For example, the Bureau holds appropriative permits, based on its own applications, that entitle it to appropriate 6,100,000 acre-feet of water for the CVP. Memorandum, "Water Supply and Water Rights Data," *Governor's Commission to Review California's Water Rights Law*, 3, 6 (August 4, 1977); see Df. Ex. 9(a) (R. 512-519). It holds other appropriative permits, based on applications assigned to the Bureau by California's Department of Finance, that entitle it to appropriate an additional 9,178,000 acre-feet of water for the CVP. *Ibid.* If the Bureau acquired its water rights independently of California's permit system, California would not know the precise amount of water allocated to the Bureau, and hence would not know the amount of unappropriated water available for others.

Thus, if the Bureau were to acquire its water rights independently of state law, the western states' ability to manage and plan the use of their unappropriated waters would be impaired, and existing water rights threatened. This result has been historically avoided because the Bureau, under section 8, has acquired its water rights under state law.[36]

B. THE UNITED STATES' CONCESSION.

The United States, in its complaint, alleges that it need not acquire its water rights under state law, an allegation consistent with the argument that it acquires a reserved water right under the "implied reservation" doctrine. However, in its brief opposing our petition for writ of certiorari, the United States conceded that "the United States has not claimed any reserved rights in connection with the New Melones Project." Brief for the United States in Opposition, 11. If this is so, it is difficult to understand the basis for the United States' argument that it need not acquire its water rights under state law, and the United States has yet to spell out the basis of its argument.

36. Of course, the western states are unable to administratively quantify federal water rights that are based on the "implied reservation" doctrine. However, in cases where the "implied reservation" doctrine has been applied by this Court, the federal rights have only involved relatively small amounts of water, such as the amounts necessary to satisfy federal needs on forest lands, wildlife refuge areas, and so forth. See note 33, *supra*. Conversely, large amounts of water are necessary to meet the purposes of federal reclamation projects under the Reclamation Act of 1902; for instance, the amount of water delivered from such projects in 1974 totaled 29.7 million acre-feet, and served 17.6 million people, which is 31% of the population of the 17 western states. U. S. Bureau of Reclamation, Dept. of the Interior, *Water and Land Resource Accomplishments*, 1974: Summary Report, 2. Thus, the western states' ability to manage their water resources would be much more greatly impaired by their inability to quantify federal rights in the field of reclamation, than by their inability to quantify federal rights in the "implied reservation" cases heretofore decided by this Court.

Since the United States lacks a reserved right, it does not acquire its water rights independently of state law under the Commerce and Property Clauses. Thus, it must acquire its water rights in the same manner as private appropriators. This Court has held that private appropriators are fully subject to the states' appropriation laws. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Thus, the United States is fully subject to California's water laws, at least with respect to the New Melones Project. By its concession, the United States has abandoned the sole legal theory that might justify the acquisition of a federal water right independently of state law, and that might sustain the lower decision.

C. THE LOWER COURT'S NEW WATER DOCTRINE.

The lower court held that the United States must acquire its water rights under state law, thus rejecting the United States' position that it acquires its rights independently of state law. Since the United States must acquire its water rights under state law, the logical consequence is that the United States must comply with the conditions which the states attach to the Bureau's water rights. The conditions are an inherent part of the water right; a water right constitutes a state's recognition that water will be put to a "beneficial use," and the conditions provide the basis for this recognition. However, the lower court avoided this logical conclusion. Instead, it ruled that the Bureau need not comply with the "substance" of the states' appropriation laws, and hence need not comply with conditions attached to the Bureau's water rights.

Perhaps unknowingly, the lower court developed a new, abberational body of water law, one that is without precedent in the history of western water law. Since the Bureau

must acquire its rights under state law, it does not acquire a reserved right. However, since the states cannot attach conditions to insure protection of the "beneficial use" of water, the Bureau does not acquire an appropriative right, at least the kind of appropriative right that other appropriators acquire. The lower decision thus results in a new water right, one that is a hybrid of a reserved right and an appropriative right.

Nothing in section 8 supports this new hybrid water right. The section requires the Bureau to comply with the states' appropriation laws, and makes no exception for the "substance" of the states' laws. To the contrary, the section specifically provides for state "control" of the "use" and "distribution" of water, thus clearly indicating that the states have authority to impose conditions to protect the "beneficial use" of water.

The lower court, in holding that the Bureau need not comply with the "substance" of the states' appropriative permit systems, rested its conclusion on the fact that section 8 does not specifically refer to such systems. App. I, 31. However, if the failure of section 8 to refer to such systems is material, there is no basis for concluding that the Bureau must comply with the "forms" of such systems. As nothing in the section specifically refers to a permit system, nothing in the section can be construed as supporting a distinction between the "forms" and "substance" of such a system. Either the section is sufficiently clear to require federal compliance with the states' permit systems, or it is not. If it is, it requires compliance with the "substance" of the systems; if it is not, it does not require compliance with the "forms" of the systems. Thus, the section does not support the hybrid water right suggested by the lower court. The Bureau must fully comply with the states'

appropriation laws, or it need not comply with those laws at all; it acquires its water rights under the states' appropriation laws or under the "implied reservation" doctrine, but not under a combination of the two. Since the United States concedes that the Bureau does not acquire its water rights under the "implied reservation" doctrine, it follows that the Bureau acquires its water rights under the states' appropriation laws in the same manner as private appropriators, and thus must comply with both the "forms" and "substance" of such laws.

III. THIS COURT HAS HELD THAT SECTION 8 REQUIRES THE BUREAU OF RECLAMATION TO COMPLY WITH STATE APPROPRIATION LAWS TO THE EXTENT NOT INCONSISTENT WITH SPECIFIC, FUNDAMENTAL POLICIES ESTABLISHED BY CONGRESS, WHICH INDICATES THAT SECTION 8 SHOULD BE READ AS NOT AUTHORIZING THE STATES TO IMPOSE CONDITIONS THAT ARE INCONSISTENT WITH THE CONGRESSIONALLY-AUTHORIZED PURPOSES OF FEDERAL RECLAMATION PROJECTS.

A. THE NEBRASKA, IVANHOE AND CITY OF FRESNO DECISIONS.

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), this Court held that section 8 requires the Secretary of the Interior to acquire appropriative permits under state law, and authorizes the states to control the allocation of water from federal projects. The Court stated:

> "[T]he Secretary of the Interior, pursuant to the [1902] Act, applied to the State Engineer of Wyoming and obtained from him permission . . . to appropriate waters, and was awarded a priority date. . . . *All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming. . . .*
>
> "The bill alleges, and we know as a matter of law [citing section 8 of the 1902 reclamation act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, *must obtain permits* and priorities *for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law.*" 295 U.S. at 42, 43. (Emphasis added.)

Similar language was repeated in *Nebraska v. Wyoming*, 325 U.S. 545, 629 (1945). In addition, the Court in the latter case noted that the Secretary had acquired appropriative permits under state law, and that the permits were subject to conditions. *Id.* at 613. Further, it was noted that the Secretary's contracts with water users "provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials." *Ibid.* The Court summarized this factual situation by declaring:

> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. *We have a compliance with that directive.*" *Id.* at 614-615. (Emphasis added.)[37]

37. The Court noted, however, that state law can do no more than control water allocations, thus striking down provisions in state law that purported to "regulate the charges which the owners of canals or reservoirs may make for the use of water." *Id.* at 615. Expressing its disapproval of the latter practice, the Court stated that "we do not suggest that where *Congress* has provided a system of regulation for federal projects, it must give way before an inconsistent state system." *Ibid.* (Emphasis added.) Although the United States argues that this language means that the states cannot even control water allocations, it is apparent that the Court merely meant to suggest that state law cannot control matters unrelated to water allocations, such as the price at which project water is sold. In any event, we shall note later our agreement with the proposition that the states cannot interfere with a *congressional* system of regulation, even where water allocations are involved. See pages 58-61, *infra*.

The lower court disregarded the language in the 1945 *Nebraska* decision on grounds that the Court in the latter case refrained from expressing an "opinion whether a different procedure might have

This Court has held, however, that the authority of the states under section 8 is limited by overriding reclamation laws and policies established by Congress. In *Ivanhoe Irrig. Dist. v. McCracken,* 375 U.S. 275 (1958), the Court held that section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431 (1970), which limits the availability of project water to persons with not more than 160 acres of land, overrides the general authority reserved to the states under section 8; hence, the states cannot require project water to be distributed in violation of the acreage limitation in section 5. That acreage limitation imposes a "specific and mandatory" obligation on federal officials that has represented "national policy for over half a century," it was noted; the limitation was the pivotal feature of Congress' effort to make water available for small farmers, and thus prevent the growth of monopolistic power. *Id.* at 291-292. The Court stated:

> "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." *Ibid.*

been followed [by the United States] so as to appropriate and reserve to the United States all of these water rights." 325 U.S. at 615; App. I, 72. In fact, the *Nebraska* Court, in refraining from expressing such an opinion, refrained from determining that Congress, by not enacting § 8, might have had the constitutional option of authorizing the Secretary to ignore state law in acquiring unappropriated water, on grounds that the United States "owns" such water. It assuredly did not suggest that the Secretary, given the existence of § 8, has the statutory option of ignoring state law in acquiring such water. The Court made this distinction clear, stating:

> "Though we assume *arguendo* that the United States did own all of the unappropriated water, the appropriations under state law were made . . . pursuant to the procedure which Congress provided in the Reclamation Act . . . [and] in the precise manner contemplated by Congress." 325 U.S. at 615.

Thus, the language relied on by the lower court was addressed to the constitutional powers of Congress, not the meaning of § 8.

Thus, *Ivanhoe* holds that the specific acreage limitation in section 5 overrides the general authority reserved to the states in section 8. The decision thus applies the normal rule of statutory construction that, in conflicts between a general statute and a specific statute relating to the same subject matter, the specific statute controls. See, *e.g., Preiser v. Rodriguez,* 411 U.S. 475, 488-490 (1973); *Enzor v. United States,* 262 F.2d 172 (5th Cir. 1958).

The *Ivanhoe* decision was followed in *City of Fresno v. California,* 372 U.S. 727 (1963). There, the Secretary of the Interior sought to acquire privately-owned water rights under his powers of condemnation, powers that are expressly granted to the Secretary under section 7 of the Reclamation Act of 1902, 43 U.S.C. § 421 (1970). This Court held that, to the extent that state law prevents the Secretary from exercising his condemnation powers, state law must yield to the specific powers vested in the Secretary under section 7.[38] Whatever the state's authority over its unappropriated waters, a state cannot prevent the Secretary from acquiring water already appropriated by others. Thus, *City of Fresno* affirms the proposition that, as in *Ivanhoe,* state law must yield to specific, fundamental provisions of the federal reclamation laws, notwithstanding section 8.[39]

38. The Court stated:

> "However, section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others." *Id.* at 630.

39. In *City of Fresno,* the Court decided only that state law could not prevent the United States from acquiring water rights by condemnation under § 7 of the 1902 act. It did not reach the question whether the United States, after acquiring such rights, is bound by limitations imposed under state law, such as conditions attached to privately-owned water rights condemned by the United States.

Thus, the two *Nebraska* decisions make clear that the Secretary must acquire his water rights under state law in the same manner as private appropriators, and that state law controls the allocation of waters under the 1902 act. However, the *Ivanhoe* and *City of Fresno* decisions make clear that the states' authority under section 8 is not absolute, and that the states cannot contravene specific, fundamental reclamation policies established by Congress, such as the policies found in sections 5 and 7 of the 1902 act.[40] Here, there is no conflict between federal and state

40. In *Ivanhoe*, the State of California, represented by the State Attorney General's office, joined with the United States in urging this Court to overturn the decision of the California Supreme Court, which had held that California law under § 8 overrides the acreage limitation contained in § 5. Accordingly, this Court properly observed that "there is no clash here between the United States and the State of California." 357 U.S. at 279. The California Attorney General took the position in that case, as in this case, that state law under § 8 cannot override specific, fundamental reclamation policies established by Congress. It was in response to this position that the Court stated in dictum:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court stated in *Nebraska v. Wyoming*, *supra*, at 615: 'We do not suggest that where *Congress* has provided a system of regulation for federal projects it must give way before an inconsistent state system.' . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." *Id.* at 291-292. (Emphasis added.)

As we make clear later, we believe that this dictum is correct to the extent that it indicates that the Bureau must acquire its water rights under state law, and that the states cannot interfere with a *congressional* system of regulation. See pages 58-61, *infra*. However, the dictum is imprecise to the extent that it indicates that "the United States [cannot be compelled] to deliver water on conditions imposed by the State," since it fails to note that such conditions may not be inconsistent with a congressional scheme of regulation, as in the present case. In its imprecise form, the dictum is inconsistent not only with this Court's decision in the two *Nebraska*

law, as in *Ivanhoe* and *City of Fresno*. Nothing in federal law authorizes the Bureau to ignore state law in acquiring

cases, but also with the legislative history of § 8; in fact, the Court failed to even refer to that legislative history.

In *Arizona v. California*, 373 U.S. 546 (1963), the Court interpreted various provisions of the Boulder Canyon Project Act ("BCPA"), 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1970), which provides for construction of reclamation facilities on the Colorado River. Sections 14 and 18 of the BCPA contain language similar to that found in § 8 of the Reclamation Act of 1902, except that §§ 14 and 18 do not require the Secretary to "proceed in conformity with" state laws. *Id.* at §§ 617m, 617q. The States of Arizona and California argued that these sections authorize state laws to override *congressional* schemes for the allocation of BCPA waters. The argument was wholly theoretical, as there were in fact no state laws that had any effect upon the BCPA in that case. Nonetheless, the Court rejected the states' argument. It held that other provisions of the BCPA, particularly § 5 thereof, evince "a congressional plan for the complete distribution of waters to users," and that, under *Ivanhoe*, this "congressional plan" overrides state laws. *Id.* at 587-588. The decision was heavily influenced by the unique legislative history of the BCPA, *id.* at 579-585, and by the fact that, since the Colorado River is an interstate river, a contrary result would subject the projects to the "varying, possibly inconsistent, commands of the different state legislatures," *id.* at 589-590.

In dictum, the *Arizona* Court stated that § 8 of the Reclamation Act of 1902 does not require the United States "in the delivery of water to follow priorities laid down by state law," citing the *Ivanhoe* dictum. *Id.* at 586-587. The Court failed to note, as did the *Ivanhoe* Court, that this dictum is inconsistent with the *Nebraska* decisions, and that the dictum is inconsistent with the legislative history of § 8; as in *Ivanhoe*, the Court failed to even refer to the legislative history of § 8. This dictum has been severely criticized by several authorities in the field of water law, who suggest that the *Arizona* decision should be regarded as no more than an interpretation of the BCPA. See Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colorado L. Rev.* 49, 54-57 (1964); Meyers, "The Colorado River," 19 *Stan. L. Rev.* 1 (1966); Trelease, "Arizona v. California: Allocation of Water Resources to People, States, and Nation," 1963 *Sup. Ct. Review* 158. In any event, as noted above, the *Arizona* dictum is correct if interpreted as precluding the states from interfering with *congressional* schemes for the allocation of water.

Finally, the dicta of *Ivanhoe* and *Arizona* is not applicable here in any event, as the conditions in Decision 1422 do not restrict the Bureau's "delivery" of water, but merely defer its right to fully impound water until it develops its own plan for the delivery of water.

For the above reasons, neither of the lower courts relied on the *Ivanhoe* and *Arizona* dicta in their decisions.

its rights to unappropriated water. To the contrary, the only provision in federal law that authorizes the Bureau to acquire unappropriated water, section 8, specifically mandates it to comply with state law. Thus, this Court's analysis in *Nebraska, Ivanhoe* and *City of Fresno* fully supports our position here.

B. THE HANCOCK AND EPA DECISIONS.

The Court of Appeals primarily relied on this Court's recent companion decisions in *Hancock v. Train,* 426 U.S. 167 (1976), and *Environmental Protection Agency (EPA) v. California,* 426 U.S. 200 (1976). There, the Court ruled that the states cannot apply their permit systems, as authorized under federal acts providing for the control of air and water pollution, to federal agencies in the absence of a "clear and unambiguous" congressional expression. 426 U.S. at 179, 211. Neither case involved an interpretation of section 8, nor involved the unique legislative history, surrounding historical circumstances or administrative practice relating to section 8. The lower court ignored these important differences. It ruled that, since section 8 does not specifically refer to the states' appropriative permit systems, it does not clearly and unambiguously require the Bureau to comply with the "substance" of these systems. App. I, 30-32, 34. The court failed to explain why, if the section is not sufficiently clear to require federal compliance with the "substance" of the states' permit systems, it is sufficiently clear to require federal compliance with the "forms" of the systems.[41]

The lower court failed to note that Congress apparently believes that the "clear and unambiguous" test was improperly applied in the *Hancock* case. In enacting recent legislation that overturns the decision, Public Law 95-95, 91 Stat. 685, 711 (1977), Congress commented in its legislative reports that the new legislation "was the intent of Congress" in passing the original act, but that "some courts, encouraged by Federal agencies, have misconstrued the original intent." S. Rep. No. 94-717, 94th Cong., 2d Sess. 45 (1976).[42] Although rules of statutory construction are developed by the judicial rather than the legislative branch, the judicial branch should not be unmindful of Congress' suggestion that its acts be read more consistently with its effort to accommodate important state interests in our federal system.

In any event, the lower court has applied the "clear and unambiguous" test to reach a result opposite to that intended by Congress. Section 8 clearly requires the Bureau to acquire its water rights under the states' "appropriation" laws, and subjects its rights to state "control" of the "use" and "distribution" of water. As noted above, the states' permit systems are the essence of their appropriation laws. See pages 33-34, *supra*. Hence, if the Bureau is not required to fully comply with the states' permit systems, it is effec-

41. It is perhaps ironic that the lower court used the *Hancock* and *EPA* decisions to reach a result opposite to that in the *Hancock* and *EPA* decisions. There, the Court held that federal agencies must comply with state "substantive" requirements relating to air and water pollution, but not with state "procedural" requirements such as permit systems. 426 U.S. at 181-186, 211-215. Here, the lower court held that the Bureau must comply with the "forms" of the states' permit systems, but not with the "substance" of such systems.

42. Similarly, a bill, recently approved by Congress and currently awaiting presidential signature, would overturn the effect of the *EPA* decision. Section 42, S. 1952, 95th Cong., 1st Sess. (1977). The accompanying legislative report stated that the bill reflects "the intent of Congress" in passing the original act, but that "the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent." S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977).

tively not required to comply with the appropriation laws of most western states. This is, of course, the result that was urged by those who opposed section 8, who favored federal control of water; it is the result that was opposed by those who supported section 8, who favored state control. Thus, the lower court has applied the "clear and unambiguous" test, presumably a guide to understand what Congress has done, to change what Congress has done. The only way that Congress' objective, to require federal compliance with the states' appropriation laws, can be achieved is by requiring federal compliance with the states' permit systems. This Court recently cited with approval Justice Holmes' dictum. "We are not free to say to Congress: 'we see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 597 (1977).

If the normal rules of statutory construction are applied,[43] section 8 clearly and unambiguously requires the Bureau to fully comply with the states' permit systems.

---

43. The lower court appeared to assume that the "clear and unambiguous" test supplants the normal rules that this Court has applied in construing federal statutes. This Court has held that a statute must be interpreted consistently with its simple, plain meaning, *Caminetti v. United States*, 242 U.S. 470, 485 (1917), that a statute must be interpreted consistently with its legislative history, *Train v. Colorado Pub. Int. Res. Group*, 426 U.S. 1 (1976), that surrounding historical circumstances are relevant in interpreting a statute, *Mattz v. Arnett*, 412 U.S. 481, 485-494 (1973), and that weight must be given to the administrative interpretation of a statute, *Udall v. Tallman*, 380 U.S. 1 (1964). The lower court's assumption, that the "clear and unambiguous" test supplants these other statutory aids, finds no support in *Hancock* or *EPA*. There, the Court noted that its decisions were consistent with the sparse legislative history and federal administrative interpretation of the acts in question. 426 U.S. at 187-190, 226-227. Thus, the "clear and unambiguous" test is merely one of several statutory aids, and does not supplant other aids.

The section clearly spells out Congress' goal, that the states are to control the appropriation and distribution of water under the 1902 act. It clearly spells out the means by which that goal is to be attained, by requiring the Bureau to be treated as an appropriator under the states' appropriation laws. However, the section does not clearly and unambiguously provide that state law can override specific federal reclamation laws or policies; the section does not address the possibility of conflicts between specific state and federal laws. Thus, *Hancock* and *EPA,* at most, support only the conclusion that the states cannot override specific reclamation laws and policies adopted by Congress. It does not support the conclusion that the Bureau is free to ignore the "substance" of the states' appropriation laws.

More fundamentally, the lower court's application of the "clear and unambiguous" test is inconsistent with this Court's analysis in the *Ivanhoe* and *City of Fresno* cases. In those cases, the Court held that, under section 8, the validity of a state law depends on whether the law is consistent with overriding federal objectives. The lower court held that the state law, at least if it consists of a condition in a permit, is invalid regardless of its consistency with overriding federal objectives. Thus, if the lower decision is correct, the validity of a state law depends on its form, not its substance. If the state law consists of a condition attached to a permit, it is invalid *per se*. If the state law takes another form, its validity depends on its consistency with federal objectives. This distinction suggests that a state legislative body could impose conditions that a state administrative body could not, even though the latter agency may have expertise in the field of water management. This result bears little resemblance to the purposes underlying section 8.

Indeed, it is improper to apply the "clear and unambiguous" test in this case, at least with the same force as in the *Hancock* and *EPA* cases. That test might have validity in cases where, as in *Hancock* and *EPA*, the states seek to regulate traditional federal activities on federal enclaves, such as military bases. The federal activity is in an area that was traditionally regulated by the federal government, and in which the state interest is presumptively marginal. Hence, it is not likely that Congress meant to tolerate state interference in the activity. The same cannot be said where, as here, the federal activity is in an area that was traditionally regulated by the states rather than the federal government, and in which the state interest is vital. In the latter case, it is more likely that Congress meant to provide a balanced accommodation of federal and state interests that allows the states to fundamentally participate in the activity, within the framework of overriding national objectives. Hence, the Court should follow its approach in the *Ivanhoe* and *City of Fresno* cases, not its approach in the *Hancock* and *EPA* cases. It should define the proper scope and limits of state control by defining overriding federal objectives, rather than presume lightly that no such control exists. Cf. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The analysis in *Ivanhoe* and *City of Fresno* is thus better suited to the complex, delicate issues of federalism in this case than the lower court's simplistic application of the "clear and unambiguous" test.

C. LIMITS OF STATE CONTROL UNDER SECTION 8.

Under a proper interpretation of section 8, the Bureau should be required to comply with the states' appropriation laws, including their permit systems, to the extent that such laws are not inconsistent with the specific reclamation laws and policies adopted by Congress. These overriding

laws and policies should include not only the general laws applicable to all projects, but also the specific laws that authorize, and describe the purposes of, individual projects. In authorizing an individual project, Congress presumably means for the project to succeed, and does not mean for the states to impair their success, regardless of the states' authority under section 8. Thus, where Congress has acted, the states cannot act differently. The authority that Congress gave the states in section 8 is circumscribed by the specific laws and policies established by Congress, including the purposes of its individual projects.

Under this approach, if Congress authorizes a reclamation project for specific purposes, the states cannot impair those purposes. If Congress provides that a project shall impound a specific quantity of water, the states cannot require the project to impound a lesser amount of water, or deny water to the project altogether. If Congress provides that the project's benefits shall be made available to a particular area, the states cannot require that the benefits be made available to a different area. However, where Congress has not spoken, the state's voice must be heard. If, for example, Congress fails to provide that a project's benefits shall be distributed to a specific area, the state is free to establish its own distributive rules if the project's purposes are not otherwise impaired. See generally Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colorado L. Rev.* 49 (1964); Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464 (1960).

This approach protects the federal interest in reclamation, by insuring that the states cannot impair that interest. This approach also protects the state interest, by insuring that the states can control water allocations to the extent

not inconsistent with overriding national goals. This approach is consistent with the broad purpose of section 8 to provide for state control of water. It allows the states, within the limits of overriding national goals, to control water allocations to non-federal users who are the ultimate recipients of water under the 1902 act. It thus continues the tradition that Congress intended to follow in passing section 8, and that has been followed in actual practice ever since. It implements the principles of federalism that lie at the heart of section 8.

This approach allows the states to play an important role in the field of reclamation, thus giving vitality to section 8. Congress, with its many other concerns and its distance from the scene, is not equipped to manage the West's waters on a continuing basis. Hence, in authorizing a reclamation project, it frequently provides only a general description of the project's purposes, expecting that the details will be administratively worked out later.[44] The question, then, is: Who should fill in these details, to the extent that the acquisition and use of water is concerned? Should the details be supplied in part by the states which are most affected by the projects, or should they be ex-

44. The New Melones Project provides a typical example. In authorizing the project, Congress provided that the project would be operated for the purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water quality control and protection of fish and wildlife. 76 Stat. 1180, 1191 (1962). No further specification was made as to how these purposes were to be fulfilled. The authorizing act provided, however, that the project is to be operated "substantially" in accordance with an engineer's report, *ibid.*, which report is contained in H. R. Doc. No. 453, 87th Cong., 2d Sess. (1962). The engineer's report describes the amount of water to be impounded by the project, *id.* at 15, but does not otherwise describe how much water will be used by each of the project's purposes, when the water will be impounded or (except for the preference given to the four counties located in the project basin, see note 5, *supra*) where the water will be used.

clusively supplied by a federal agency that is answerable to no one except, in an abstract sense, to Congress?

There are ample reasons why this authority should rest with the states, to the extent that the acquisition and use of water is concerned. As noted earlier, the federal reclamation function results in the consumption of water by non-federal interests on non-federal lands, not federal consumptive uses on federal enclaves. There is little federal interest in the consumption of water by a particular non-federal user or in a particular non-federal area, assuming that Congress has not addressed these matters. Conversely, there is an important state interest in how or where the water is consumed, assuming that the state has adopted a specific law or policy on the matter. California, for example, is vitally interested in whether the waters of the CVP, which are wholly intrastate, are used to promote urban growth in its congested metropolitan areas or agricultural production in its interior valleys. If Congress has not decided how to allocate water between these interests, it is difficult to see what federal interest prevents California from making the decision.

The acquisition and use of water under the 1902 act has a substantial impact on the economic and political development of the western states. Its use results in a Darwinian-like selection among competing agrarian, municipal and industrial interests, and among competing geographical areas. Its use determines which communities will grow and prosper, and which will blend into the desert. Its use affects the state's environment, the quality of its waters, the habitats of its fish and game. Its use diminishes the availability of water for other uses. Other states are, of course, also affected by the use of such water, for other states may depend on the foods and goods that are the ultimate product

of the federal projects. However, the interests of those other states are adequately protected by the limitations on state control described above. More importantly, no state is affected by the use of such water as much as the state in which the use occurs, particularly where, as here, intrastate waters are involved. It is not hyperbolic to say that the destiny of the western states is tied to the use of such water, and that water is "the very life blood of [their] existence." *Chow v. City of Santa Barbara,* 217 Cal. 673, 702 (1933). Decisions concerning the use of such water are thus too important to the states, too fundamentally intertwined with their economic and political order, to rest exclusively with a federal bureaucratic agency acting with minimal congressional guidance.

In this case, California does not even seek to control the use of water from the New Melones Project. Rather, it seeks only to defer full impoundment of waters for the project until the Bureau develops its own plan for water uses. If California lacks the power to impose even this modest limitation on the federal right, the Bureau would be able to acquire California's unappropriated waters without California even knowing where, or for what purposes, the Bureau intends to use such waters; California would not know whether its waters are to be used in northern or southern California, or primarily for agricultural, industrial or municipal purposes. Since section 8 authorizes the states to control water uses, California has the authority, *a fortiori,* to require the Bureau to develop and submit its own plan for water uses before obtaining California's unappropriated waters.

There is little reason to fear that the western states would impair Congress' reclamation objectives, even if they had such authority under section 8. In passing the 1902 act, Con-

gress expressed the hope that section 8 would "encourage" the western states to adopt more "perfect and uniform" water laws, in order to assist the federal reclamation function. See note 26, *supra.* Similar hopes were expressed by federal reclamation officials after the passage of the act. See note 26, *supra.* Many western states responded by adopting special laws that give federal authorities an advantage over competing users in the acquisition of water rights.[45] Thus, the western states have accomodated, rather than frustrated, federal interests in the field of reclamation. There is a natural harmony between federal and state interests in this field, for both are served by the success of the federal projects. The states have thus responded to federal interests in the way that Congress expected when it adopted its basic reclamation law in 1902. If the states were to respond differently, Congress could alter that law by providing for the acquisition of federal water rights independently of state law. In the three-quarters of a century since the passage of that law, Congress has failed to so act.

Our suggested approach results in a sound policy of water management, for it promotes uniformity of water allocation systems in the western states. It provides that, within the limitations on state control described above, water from

---

45. For instance, some states insure an early priority date for federal water appropriations by allowing the United States to reserve unappropriated water prior to filing a permit application. See Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 467 (1960). Some states permit state officials to withdraw water from appropriation, so that it may be used for federal purposes. *Ibid.* Some states, such as California, allow state agencies to assign state-held water rights applications, containing an early priority date, to the federal government. *Ibid.* Some states exempt the federal government from procedures that require appropriations to be completed within a certain period after permits are issued. *Ibid.* Some states exempt the federal government from requirements that construction plans be approved by the state. *Ibid.*

federal reclamation projects shall be distributed under the same rules and procedures that apply to other waters. This is not to suggest that absolute uniformity should be achieved, for, as in *Ivanhoe,* Congress' overriding national objectives prevent *all* state laws from being applied to federal water uses. However, where these national objectives are neutral, uniform systems of distribution should be encouraged. The existence of two separate distributive systems in the western states, wholly unintegrated, would result in an inefficient, disjointed system of water management that the water-scarce western states can ill afford.[46]

Finally, western water rights have traditionally been under state rather than federal control. Thus, the states have developed ample skills and experience in the field of water management, and in allocating waters harmoniously with the public interest. Water needs in the West are dynamic, not static; they are constantly changing in response to economic, demographic and environmental factors. California's water needs, for example, have changed with the growth of its metropolitan areas, and with the relative growth of its agricultural industry and decline of its mining industry. Even given the existence of a particular need, such as the needs of a federal reclamation project, it is sometimes difficult to determine precisely how much water is necessary to satisfy the need; even today, the State Board is studying how much water is necessary to achieve the purpose of the New Melones Project to protect downstream fish and wildlife. Thus, those who manage the West's waters must provide a flexible response to competing demands upon water.

---

46. In passing § 8, Congress noted that the section "will undoubtedly tend to uniformity . . . of water laws throughout the region affected." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902).

This flexibility is the primary virtue of the states' appropriative permit systems. These systems enable the states to keep their fingers on the pulse of their changing water needs. The systems consist of hearing procedures that afford competing water users the opportunity to present evidence and cross-examine witnesses, thus producing a record that provides the basis for judicial scrutiny. *E.g.*, Cal. Wat. Code §§ 1340-1360. Conversely, the Bureau, which has not traditionally controlled water rights, has no equivalent procedures, and thus may be less responsive to local water needs. This is why Congress provided for state control of water, both under the 1902 act and under earlier acts. It believed that local agencies are best equipped to make decisions affecting local needs. Thus, the western states have developed valuable resources, in terms of knowledge and experience in water management, that have always played a crucial role in determining the use of water under the Reclamation Act of 1902, and that should continue to do so.

IV. THE CONDITIONS IMPOSED BY CALIFORNIA ARE NOT INCONSISTENT WITH THE PURPOSES OF THE NEW MELONES PROJECT.

The lower court did not conclude that the conditions in Decision 1422 are inconsistent with the purposes of the New Melones Project. It affirmed summary judgment on the ground that state-imposed conditions cannot be attached to the Bureau's water rights, regardless of whether the conditions are consistent with project purposes.

This Court must conclude, as a matter of law, that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project. The act authorizing

the project expressly requires that the project shall be operated "pursuant to the Federal reclamation laws," 76 Stat. 1191 (1962), which, in section 8 of the 1902 act, expressly provide that a water right exists only to the extent that the water is put to a "beneficial use." See note 14, *supra*. In Decision 1422, the State Board made factual findings, based on the Bureau's own evidence, that the Bureau had failed to develop a plan for the use of project water, and thus had failed to show that its proposed water uses were consistent with the "beneficial use" of water. Df. Ex. 2, pp. 15-16 (App. II, 21-22). The Bureau, although a party to the administrative proceeding that led to the issuance of Decision 1422, did not seek mandamus review of the State Board's findings. Hence, the findings are final under California law. Cal.Wat. Code § 1360; *Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90 (1955); *French v. Rishell*, 40 Cal. 2d 477 (1953). They are similarly final under federal law. *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 (1966); *Safir v. Gibson*, 432 F.2d 137 (2d Cir. 1970); *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 857 (S.D. Cal. 1958). Accordingly, the doctrine of collateral estoppel bars the United States from now challenging the validity of the findings. *Ibid.* In fact, the United States conceded below, in oral argument, that it cannot contest the validity of the findings. App. I, 36 n.1. In short, Congress, in authorizing the New Melones Project, did not intend for water to be impounded until a "beneficial use" was shown, and the State Board's findings, that the Bureau has not shown a "beneficial use," are final. Hence, this Court must conclude, as a matter of law, that the conditions of Decision 1422 are fully consistent with the purposes of

the project. Cf. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966).[47]

Independently of the doctrine of collateral estoppel, it is clear that the conditions, in deferring full impoundment of project waters until the Bureau develops a plan for their use, are fully consistent with the congressionally-authorized purposes of the project.[48] As noted earlier,

---

47. Lower federal courts have held that the doctrine of collateral estoppel is applicable to decisions of administrative agencies, if the administrative proceedings satisfied "procedural and substantive due process" and the findings are "supported by substantial evidence on the administrative record as a whole." *Paramount Transport Systems v. Chauffeurs Local 150*, 436 F.2d 1064, 1065-1066 (9th Cir. 1971). Independently of the doctrine of collateral estoppel, this Court has held that, in determining the constitutionality of administrative decisions, the factual findings of a state agency must be administratively upheld, if supported by substantial evidence and consistent with procedural due process. *Railway Comm'n v. Rowan and Nichols Oil Co.*, 311 U.S. 570, 575-577 (1941); *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 348 (1951); *Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542, 543 (9th Cir. 1971).

There can be no question that the administrative proceedings leading to the issuance of Decision 1422 satisfy substantive and procedural due process, and are supported by substantial evidence based on the whole administrative record. In proceedings before the State Board, parties are given the right to call and examine witnesses, to cross-examine opposing witnesses, to impeach witnesses, to offer exhibits and to offer rebuttal evidence. 23 Cal. Admin. Code § 733(j). Moreover, the administrative record shows that the State Board's findings were supported by substantial evidence, and indeed were based on the Bureau's own evidence. The reporter's transcript of the administrative proceeding is contained in Defendants' Exhibit 10, the briefs filed by the parties therein are contained in Defendants' Exhibit 11 and the documentary evidence therein is contained in Defendants' Exhibit 12.

48. As noted earlier, the other conditions in Decision 1422 are fairly minor, and simply repeat provisions already found in the congressional act authorizing the New Melones Project, reaffirm contractual obligations voluntarily incurred by the Bureau, and adopt the Bureau's own estimates of water needs for various project purposes. See pages 6-7, *supra*. These conditions do not substantially affect the Bureau's plans to acquire and use water for the project, much less conflict with the congressionally-authorized purposes of the project.

Congress expected the project waters to be used for a proposed unit of the CVP that will apparently not be approved by Congress. See pages 8-9, *supra*. The Bureau has yet to develop an alternate plan for the use of water. Nothing in federal law requires that project waters be fully, and immediately, impounded where there is no congressional plan for the use of the water, and where the Bureau has not developed an alternate plan for its use. Indeed, it would be unwise for a semi-arid state, such as California, to prematurely commit its precious, limited water resources to uses that have not been selected or identified. California looks forward to the time that the project's waters can be impounded, and its purposes fulfilled. However, California should be allowed to know how these waters will be used before it approves their impoundment. Thus, the conditions in Decision 1422 are not inconsistent with congressional law or policy, including the purposes of the New Melones Project; the conditions are inconsistent only with the Bureau's administrative decision to fully impound waters before it develops a plan for their use, a decision that has not been mandated by Congress. Hence, state law conflicts only with a federal administrative decision, not with congressional laws or policies.

V. ASSUMING ARGUENDO THAT SECTION 8 DOES NOT REQUIRE THE BUREAU TO FULLY COMPLY WITH THE STATES' APPROPRIATION LAWS, THE BUREAU SHOULD BE REQUIRED TO FULLY COMPLY WITH THESE LAWS WHEN IT ELECTS TO ACQUIRE ITS WATER RIGHTS UNDER STATE LAW.

Assuming *arguendo* that section 8 does not require the Bureau to comply with state law in acquiring and using water under the 1902 act, the Bureau should nonetheless be required to fully comply with state law when it elects

to acquire its water rights under state law. If, as the United States argues, the Bureau acquires its water rights independently of state law, it should be required to comply with conditions attached to water rights which it elects to acquire under state law. When the Bureau applies for a water right under state law, the state is called on to conduct an expensive, lengthy hearing in processing the application, and to develop conditions that will coordinate the Bureau's water rights with the water rights of state and private appropriators. If the state performs these important functions at the Bureau's request, the Bureau should not be free to retain the state-granted right without complying with the obligations which the state attaches to the right. This result is a simple product of the equitable doctrines of estoppel, and election and waiver. The United States is fully subject to these equitable doctrines. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 98-99 (9th Cir. 1970); *Hornsby v. Dobard*, 291 F.2d 483, 486 (5th Cir. 1961).

The Bureau acquires an important benefit under the states' appropriation laws, a benefit which may induce the Bureau to comply with state law even if it is not required to do so under section 8. By obtaining its water rights under state law, the Bureau obtains both a recognition and quantification of its water rights without subjecting itself to an expensive, lengthy general stream adjudication involving all competing water claims. See note 34, *supra*.[49] If the Bureau elects to obtain this important benefit under state law, it must, as a matter of equity, fully comply with state law. The Bureau should not be allowed to obtain

---

49. Under the so-called McCarren Amendment, the United States is subject to general stream adjudications notwithstanding the doctrine of sovereign immunity. 43 U.S.C. § 666; *United States v. District Court*, 401 U.S. 520 (1971).

the benefits of state law free of the burdens of state law. It should not be allowed to acquire a right under state law without subjecting itself to the duty which the state attaches to the right. Hence, it should not be allowed to obtain a permit without obligating itself to comply with the conditions in the permit.

VI. ASSUMING ARGUENDO THAT SECTION 8 DOES NOT REQUIRE THE BUREAU TO FULLY COMPLY WITH THE STATES' APPROPRIATION LAWS, THE BUREAU MUST FULLY COMPLY WITH THESE LAWS WHEN IT ELECTS TO OBTAIN AN ASSIGNMENT OF STATE-HELD WATER RIGHTS.

Assuming *arguendo* that section 8 does not require the Bureau to comply with state law in acquiring and using water under the 1902 act, the Bureau must nonetheless fully comply with state law when it elects to acquire an assignment of state-held water rights. Under these circumstances, the Bureau is not acquiring a federal water right independently of state law; rather, it is acquiring the state's own water rights. When the Bureau elects to acquire the state's own property rights, it must fully comply with limitations which the state attaches to the rights. The Bureau, as an assignee, cannot obtain greater rights than were held by the assignor, the state agency which held the water rights. Since the assignor would have been bound by the conditions, the Bureau is also bound. A contrary result would not only be inequitable, but would also sanction an unconstitutional federal invasion of the state's property rights, a result which should not be tolerated by a Court which recently reaffirmed the state's constitutional immunity from such invasions. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). Congress avoided these equitable and constitutional problems by

requiring federal compliance with state water laws under section 8.

The lower court held otherwise. It held that the water rights of the California agency, the State Department of Finance, were inchoate at the time of their assignment to the Bureau, since the rights were based on applications that had not yet been approved by the State Board; the rights were not perfected until the State Board approved the applications, at which time the rights were held by the Bureau. App. I, 38-41. The Court stated that, at the time that the assigned applications were thus approved, the Bureau "was acting in the same capacity as when it filed its own applications," and that its "substantive rights arose from the Congressional legislation, not from the assignment." App. I, 40. Hence, the court concluded, the Bureau is not subject to conditions attached to the approved applications. *Ibid.*

However, the decision overlooks the fact that the rights assigned to the Bureau, although inchoate, had the incident of an early priority date, based on the year—1952—that the State agency filed its applications. This early priority date is an important feature of the perfected right now held by the Bureau, for it affords the Bureau a superior right as against competing water users with post-1952 priority dates. This important feature is a product of state law, not federal law. Under federal law, the Bureau can obtain, at most, a priority date based on the date of its *own* applications.[50] Nothing in federal law authorizes the Bureau to obtain an earlier priority date based on the

---

50. Even under the "implied reservation" doctrine, a federal agency is only entitled to a priority date based on the date that the water is reserved for federal purposes, *i.e.* the date that the lands are withdrawn from the public domain. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

applications filed by the State. The Bureau can obtain the earlier priority date only by obtaining an assignment of the State-filed applications. Hence, the lower decision is fundamentally wrong in stating that the Bureau's "substantive rights arose from the Congressional legislation, not from the assignment." App. I, 40. Its rights arose directly from the assignments.

Thus, the inchoate nature of the assigned right is irrelevant. It is relevant only that the right was valuable, in that it enabled the Bureau to obtain an advantage over competing water users. Suppose, for example, that a state holds an inchoate right, such as an option to buy a building, which it sells to a federal agency on condition that the federal agency comply with the state's zoning laws. Clearly the federal agency is bound to comply with the state's zoning laws if it purchases the option, notwithstanding the inchoate nature of the option. This is not to suggest that the federal agency may lack constitutional powers to acquire the building independently of its powers under the option, and thus avoid the encumbrances of the state's zoning laws. However, if the federal agency, in order to gain the benefits of the option, elects to acquire its rights under the option rather than the Constitution, it is bound by the encumbrances of state laws. Similarly, if the Bureau acquires assignments of state-held water rights under state law, it is bound by conditions which the state attaches to the rights, regardless of whether the rights were inchoate at the time of the assignment.

The lower court has confused the difference between the Bureau's own water rights, and State-held water rights that are assigned to the Bureau. If it elects to obtain one such right, it cannot gain the benefits of the other. If it acquires its own water rights, it obtains a permit free of

conditions, assuming *arguendo* that the court's interpretation of section 8 is correct; however, it cannot thus obtain the 1952 priority date that belongs to the State. Conversely, if it acquires an assignment of the State-held water rights, it obtains the 1952 priority date, but is bound by conditions which the State attaches to the rights. The lower decision awards the Bureau the benefits of both kinds of water rights, by allowing the Bureau to obtain a condition-free permit with a 1952 priority date. This result both violates California's constitutional rights under the Tenth Amendment, cf. *National League of Cities v. Usery, supra,* and exceeds the Bureau's authority under section 8.[51]

CONCLUSION

The question in this case is whether the western states can participate in the reclamation process, by controlling federal water appropriations to the extent not inconsistent with overriding congressional objectives. Under these circumstances, the congressional interest is, by definition,

---

51. The lower court stated that, at the time that the State-filed applications were assigned to the Bureau, the assignments were not conditioned upon acceptance of State-imposed conditions. App. I, 40. This statement overlooks the fact that the assignments did not become effective until their approval by the State Board, at which time the State clearly expected the Bureau to comply with the conditions therein. Df. Ex. 4 (App. II, 69-71). Moreover, the Bureau, when applying to the State Board for approval of the assignments, expressly agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and the article in turn provides that such permits shall be effective to the extent that the water "is used for a useful and beneficial purpose in conformity with this division of the [California] Water Code." Df. Ex. 3(a), 3(b) (App. II, 49, 57). Hence, it was clearly expected at all relevant times that the Bureau would comply with conditions attached to the permits resulting from the assignment of the State-filed applications.

neutral. Conversely, the state interest is substantial. Thus, a proper balance of federal and state interests would allow the states to exercise limited control of federal appropriations. In the field of reclamation, congressional and state aims are not inherently contradictory; they are, within limits, compatible. To the extent that they are compatible, both should be served.

This Court has shown increasing willingness to accommodate state interests within the framework of our federal system of government. Under the preemption doctrine, for example, the Court now appears to require "a flexible conception of federal-state relations rather than one of absolute federal supremacy." Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 COLUM. L. REV. 623, 641 (1975). In applying the preemption doctrine, this Court has interpreted federal statutes in a manner that protects federal interests from state intrusions, but accommodates state interests to the extent that no such intrusions occur. The same balancing approach has been followed in interpreting federal statutes where the preemption doctrine is not involved.[52]

---

52. For instance, the Court has held that, in the field of labor law, "the substantive law to apply" with respect to collective bargaining contracts "is federal law, which the courts must fashion from the policy of our national labor laws;" however, "state law, if compatible with the purposes of" federal law, "may be resorted to in order to find the rule that will best effectuate the federal policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). The Court has held that the liability of the states under the federal antitrust laws depends on the nature of the state interest, and the extent to which the state interest is served by the particular act in question. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar*, ...U.S. ...., 45 U.S.L.W. 4895 (1977). It has held that, under the Outer Continental Shelf Act, 43 U.S.C. §§ 1331-1343, state laws are applicable on the outer continental shelf to the extent not inconsistent with *specific* federal laws. *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1959).

The same approach should be followed in interpreting section 8. This approach gives meaning to the principles of federalism on which our constitutional order is based. These principles of federalism guided Congress in enacting its basic reclamation law in 1902, and thus should guide the resolution of the issues here.

EVELLE J. YOUNGER
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

RICHARD C. JACOBS
Deputy Attorney General

By RODERICK WALSTON
Attorneys for Petitioners

Appendix

Amendment of Section 8 of S. 3057, in the 57th Cong., 1st Sess. (1902), as Discussed in Note 19, Supra.

As passed by the Senate, section 8 of S. 3057 provided:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provision of this act; . . ." S. Rep. No. 254, 57th Cong., 1st Sess. 9 (1902)

In the House amendment, the first sentence quoted above was left intact. The second sentence was deleted, however, and in its place the following language was inserted:

> "[T]he Secretary of the Interior, in carrying out the provisions of this act, *shall proceed in conformity with* such laws and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any *interstate stream* or the waters thereof . . ." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 20 (1902). (Emphasis added.)

The leading congressional authority on reclamation, Congressman Newlands of Nevada, stated that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674. Further, the House report described the amendment as one of several "minor amendments." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 5 (1902). These statements make clear that the amendment was not intended to substantially alter the effect of S. 3057, which, as the

lower court noted, contained a "strong States' rights provision." App. I, 59.

The purpose of the amendment is easily explained. Section 8 was criticized by opponents of the reclamation bill on grounds that the section might be construed to provide the states with *absolute* control of water, and thus enable an upstream state to prevent the flow of interstate waters to users in a downstream state. *E.g.*, 35 Cong. Rec. 6696 (Congressman Ray); H.R. Rep. No. 794 (Minority Rep.), 57th Cong., 1st Sess. 16 (1902). Shortly after Senate approval of the reclamation bill, a meeting was held between President Roosevelt and a congressional delegation, principally to strengthen the anti-monopoly provisions of the bill. 35 Cong. Rec. 6674 (Congressman Newlands).[1] At the meeting, it was agreed to amend section 8 to protect the "right" of downstream users to the waters of an "interstate stream." 35 Cong. Rec. 6672. To remove the inconsistency between the new language and the remaining language that state laws "govern and control" water, the latter provision was stricken as part of the same amendment, in favor of the provision requiring the Secretary to "proceed in conformity with" state laws. *Ibid.* As a result of the amendment, a number of the bill's proponents stressed, during the ensuing House debate, that an upstream state could no longer limit the flow of interstate waters to a downstream state; instead, the Secretary would initially determine the amount of water to be distributed to each state, and each state would then determine how the water is to be distributed within the state. *Id.* at 6759 (Congressman Martin), 6728

1. Newlands stated that the President "was somewhat in doubt as to whether the bill was sufficiently guarded in the interests of homeseekers," *ibid.*, an apparent reference to the provision in the act, § 5, that imposes an acreage limitation and requires residency. See 43 U.S.C. § 431 (1970).

(Congressman Burkett), 6676 (Congressman Mondell). This analysis is confirmed by a contemporaneous account of the meeting between the President and the congressional delegation, which states:

> "Congressmen Sutherland and Mondell strenuously insisted upon the provision for local control remaining in the bill, calling attention to the fact that each of the arid States had passed laws which were the result of years of experience . . .; that these laws were now recognized as controlling the waters, but if the matter were turned over to national control much confusion and friction would result; . . . that inasmuch as it was purely a local matter the people of the various States were in a better position to control the subject than officials in Washington two or three thousand miles away. . . .
>
> "The President substantially acquiesced in this view, but expressed the fear that if the provision that State laws shall control the appropriation of water should remain in the bill, it might be construed as permitting individual States to deny the right of citizens of one State to take water from another, and it was finally agreed that the bill should be so amended as to preclude any construction which would permit any State to deny to the citizens of another State the right to take water from the former into the latter." Df. Ex. 16 (App. II, 114-115).

Thus, the amendment was merely intended to limit state control of interstate waters, not to otherwise transfer control from the states to the federal government.

In interpreting the amendment, the lower court relied on a statement by Congressman Robinson during the House debate. App. I, 60-61. The court failed to mention that Robinson was an opponent of the bill, which tends to discredit his statement. See, *e.g.*, *Schwegmann Bros. v. Calvert*

Distillers Corp., 341 U.S. 385, 394-395 (1951). The court also failed to mention that his statement was concededly based on "newspaper accounts." 35 Cong. Rec. 6670. In any event, Robinson stated that, at the meeting between the President and the congressional delegation, the President favored "national control of canals and water distribution." *Ibid.* Ignoring the fact that Presidents do not always succeed in having their views written into congressional legislation, the court apparently assumed that the President managed to have the bill amended to *eliminate* state control of water. However, the court omitted that portion of Robinson's statement where Robinson stated, to the contrary, that the amendment resulted in a "*blending* of the views of the President for national control and the contrary view of platforms and constitutions for State control." *Ibid.* (Emphasis added.) This "blending" of the views of national and state control was, of course, achieved by eliminating the ability of upstream states to control interstate waters flowing to downstream states. Also, the lower court ignored the fact that Congressman Robinson's statement was immediately clarified in part, and repudiated in part, by Congressman Newlands, who, as noted above, stated that, "if the gentleman [Robinson] will examine the bill, . . . he will find that it is identical in its provisions, though differing somewhat in phraseology," with the original bill. *Id.* at 6673-6674.

The lower court also relied on an autobiographical statement of President Roosevelt published in 1920, in which Roosevelt stated that his "interference was necessary to prevent it [the bill] from being made unworkable by an undue insistence upon States Rights. . . ." *Theodore Roosevelt: An Autobiography* 396 (Scribner & Sons, Inc. 1920); App. I, 61-62. We are unaware of any rule of

law upholding the admissability of an autobiographical statement appearing 18 years after the events described, a difficulty which did not trouble the court. In any event, Roosevelt's statement is nonetheless correct in that he was instrumental in having the bill amended to prevent upstream states from controlling the waters of interstate rivers, an approach which would have indeed made the bill "unworkable by an undue insistence upon States Rights. . . ." Otherwise, Roosevelt favored the view, as expressed in his 1901 message to Congress, that "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws . . . ." 35 Cong. Rec. 6675.

Finally, the lower court failed to note that the House debate, which occurred *after* the amendment took effect, clearly indicated that section 8 provides for state rather than federal control of water, and thus removed any doubts concerning whether the amendment was intended to transfer such control from the states to the federal government.